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**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

**JASPER F. WILLIAMS, M.D. AND
EUGENE F. DIAMOND, M.D.,**

Appellants,

and

ARTHUR F. QUERN, Director, Illinois Department of Public Aid,

Appellant,

and

THE UNITED STATES,

Appellant,

vs.

**DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own
behalf and on behalf of all others similarly situated; CHICAGO
WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit
corporation, and JANE DOE, on her own behalf and on behalf
of all others similarly situated,**

Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Table of Authorities	iii
Jurisdictional Statement	1
Citation to Opinion Below	3
Jurisdiction	4
Constitutional, Statutory and Regulatory Provisions Involved	5
Additional Statutory and Regulatory Provisions	7
Questions Presented	7
Statement of the Case	8
The Questions Are Substantial	13
I. Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those in-	

stances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?	13
II. Whether Congress, acting under its legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?	15
III. Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?	15
IV. Whether the State of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?	23
Conclusion	26
Appendices—	
Pertinent Statutes	App. 1
43 Federal Register 57,253 (1978) (to be codified as 42 C.F.R. §440.230)	App. 7
Notice of Appeal	App. 9

TABLE OF AUTHORITIES

Cases

	PAGE
Beal v. Doe, 432 U.S. 438 (1977)	24, 25
Cincinnati Soap Co. v. U. S., 301 U.S. 308 (1937)	14
Coe v. Hooker, 406 F.Supp. 1072 (D.N.H. 1976)	25
Dandridge v. Williams, 397 U.S. 471 (1970)	18
D— R— v. Mitchell, 456 F.Supp. 609 (D. Utah 1978)	16
Doe v. Mundy, 441 F.Supp. 447 (E.D. Wis. 1977)	16
Freiman v. Walsh, No. 77-4171-CV-C (W.D. Mo., filed Jan. 26, 1979)	16
Fusari v. Steinberg, 419 U.S. 379 (1975)	4-5
Helvering v. Davis, 301 U.S. 619 (1937)	23
Lochner v. New York, 198 U.S. 45 (1905)	22
Maher v. Roe, 432 U.S. 464 (1977)	16, 17, 19, 20, 22
Mathews v. De Castro, 429 U.S. 181 (1976)	23
Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974)	19
Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916)	5
Ohio v. U.S. Civil Serv. Comm'n., 65 F.Supp. 776 (S.C. Ohio 1946)	14
Poelker v. Doe, 432 U.S. 519 (1977)	16, 17
Quern v. Mandley, 436 U.S. 725 (1978)	21
Roe v. Norton, 522 F.2d 928 (2d Cir. 1975)	25
Roe v. Wade, 410 U.S. 113 (1973)	20, 22

	PAGE
San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973)	18
Steward Machine Co. v. Davis, 301 U.S. 548 (1937)	18
United States v. Raines, 362 U.S. 17 (1960)	5
United States v. Wise, 370 U.S. 405 (1962)	25
Woe v. Califano, 460 F.Supp. 234 (S.D. Ohio 1978)	16
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	22
Zbaraz v. Quern, 572 F.2d 582 (7th Cir. 1978)	—

Constitutional Provisions

U.S. Const. art. I, 9, cl. 7	5, 13, 14
U.S. Const. amend V	2, 5, 13, 14
U.S. Const. amend. IX	8
U.S. Const. amend. XIV	2, 5, 8

Statutes

28 U.S.C. § 1252 (1976)	2
28 U.S.C. § 1331 (1976)	4
28 U.S.C. § 1343 (1976)	4
28 U.S.C. § 1343(3) (1976)	8
28 U.S.C. § 1343(4) (1976)	8
28 U.S.C. § 1334 (1976)	4
28 U.S.C. § 2201 (1976)	8
42 U.S.C. § 1396 (1976)	7, 23, 25
Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1976)	11, 13, 23, 24, 25

	PAGE
42 U.S.C. § 1396a (1976)	7
42 U.S.C. § 1396a(a) (10)(c)(i) (1976)	25
42 U.S.C. § 1396a(a)(17) (1976)	2, 24
42 U.S.C. § 1983 (1976)	4, 8
§ 210, Pub. L. No. 95-480, 92 Stat. 1586 (1978)	2, 5
P.A. 80-1091, Ill. Rev. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (1977 Supp.)	2, 6, 8, 9, 12, 15-16

Other Authorities

43 Fed. Reg. 57,253 (1978) (to be codified as 42 C.F.R. § 440.230)	2, 7, 25
Fed. R. Civ. P. 24	11
Fed. R. Civ. P. 57	8
123 Cong. Rec. H10130 (daily ed. Sept. 27, 1977) (Remarks of Rep. Conte)	21
122 Cong. Rec.	18
Center for Disease Control, <i>Morbidity and Mortality Weekly Report</i> , Feb. 2, 1979, Vol. 28, No. 4	20
George, "Current Abortion Laws: Proposal and Movements for Reform," 17 <i>West. Reserve L. Rev.</i> 371 (1965)	24
Hardy, "Privacy and Public Funding, <i>Maher v. Roe</i> as the Interaction of <i>Roe v. Wade</i> and <i>Dandridge v. Williams</i> ," 18 <i>Ariz. L. Rev.</i> 903 (1976)	17
Wilkinson, "The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality," 61 <i>Va. L. Rev.</i> 945 (1975)	19

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On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellants, Jasper F. Williams, M.D., and Eugene F.
Diamond, M.D., Intervening Defendants in the District

Court (hereinafter, "Intervening Defendants"), bring this direct appeal from a Final Judgment and Order entered April 30, 1979 by the United States District Court for the Northern District of Illinois, Eastern Division, holding an Act of Congress [§210 of Pub. L. 95-480, 92 Stat. 1586 (1978), hereinafter the "Hyde Amendment"] unconstitutional under the Fifth Amendment to the Constitution of the United States, and holding an Illinois statute [P.A. 80-1091, ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1 (1977 Supp.), hereinafter "P.A. 80-1091"] unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Further, Intervening Defendants bring this direct appeal from a Ruling and Mandate of the United States Court of Appeals for the Seventh Circuit, Civil Action Numbers 78-1669, 78-1709, 78-1787, 78-1890, 78-1891 and 78-2029 (February 13, 1979), holding that Illinois P.A. 80-1091 violated the objectives of the Medicaid Act, 42 U.S.C. § 1396a(a)(17) (1976), and the regulations promulgated pursuant thereto, 43 Fed. Reg. 57,253 (1978) (to be codified as 42 C.F.R. §440.230), as set forth in the Appendix attached to this Jurisdictional Statement (hereinafter "Intervening Defendants' Appendix") at App. 7. The Seventh Circuit Court of Appeals ruled that, although the Illinois statute P.A. 80-1091 violated the federal statute and regulations issued thereunder, the Hyde Amendment was itself intended as a substantive amendment to Title XIX of the Social Security Act and that, therefore, Illinois is required by Title XIX to fund all abortions reimbursed under the Hyde Amendment.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1252 (1976).

OPINIONS BELOW

The initial order was issued in this action by the United States District Court for the Northern District of Illinois, Eastern Division, on December 21, 1977 whereby the court abstained from consideration of the case is not officially reported. It and all subsequent District Court opinions, judgments, and orders are filed in the District Court at Civil Action Number 77 C 4522. The initial opinion and order rendered by the United States Court of Appeals for the Seventh Circuit on March 15, 1978, which reversed the District Court's abstention order is reported at 572 F.2d 582 (7th Cir. 1978).

The Circuit Court remanded to the District Court for consideration of the case. On May 15, 1978, the District Court entered a Final Judgment pursuant to an unreported Memorandum Opinion and Order of the same day and granted summary judgment to Plaintiffs.

Defendant Quern and the Intervening Defendants appealed from this Judgment and Order to the United States Court of Appeals for the Seventh Circuit. The Opinion and Order rendered by the Circuit Court on February 13, 1979 are not officially reported. They were filed in the Circuit Court at Civil Action Numbers 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, and 78-2029 (7th Cir. 1979) and are set forth respectively in the Appendix of the Jurisdictional Statement of Arthur F. Quern (hereinafter "Quern Appendix") at A-1 *et seq.* Intervening Defendants now appeal from this decision.

The Circuit Court remanded to the District Court for consideration of the constitutional issues of the case. The Memorandum Opinion thereafter issued by the District Court on April 29, 1979 is not officially reported. The Opinion, Final Judgment and Order were filed in the United

States District Court for the Northern District of Illinois, Eastern Division, at Civil Action Number 77 C 4522. The Opinion is set forth in the Quern Appendix at A-21 *et seq.* The Final Judgment is set forth in the Quern Appendix at A-43 *et seq.* Intervening Defendants now appeal from said Decision, Final Judgment and Order.

JURISDICTION

This is a civil proceeding to which the United States is a party and in which an Act of Congress has been held unconstitutional. The Plaintiffs invoked jurisdiction in the District Court under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343 (1976).

The date of the judgment in the United States District Court for the Northern District of Illinois sought to be reviewed is April 30, 1979. The date of the judgment in the United States Court of Appeals for the Seventh Circuit sought to be reviewed is February 13, 1979.

Notice of Appeal to this Court was duly filed by the Intervening Defendants in the United States District Court for the Northern District of Illinois, Eastern Division on May 2, 1979, and is set forth in the Intervening Defendants' Appendix at App. 7.

The jurisdiction of this Court to hear this appeal rests on 28 U.S.C. §1252 (1976), which confers jurisdiction to review by direct appeal the decision of a district court which holds an Act of Congress unconstitutional in any civil action to which the United States is a party. The United States intervened as a party Defendant pursuant to Fed. R. Civ. P. 24 when the Seventh Circuit raised the question of the constitutionality of the Hyde Amendment and remanded to the District Court. *See* Quern Appendix at A-20.

This Court has jurisdiction over the "whole case" in an appeal pursuant to 28 U.S.C. §1252 (1976). *Fusari v. Stein-*

berg, 419 U.S. 379 (1975); *U. S. v. Raines*, 362 U.S. 17 (1960), *Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916). Thus, the February 13, 1979 decision of the Seventh Circuit Court of Appeals on statutory issues arising under the Social Security Act is also properly before this Court.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

THE CONSTITUTION

Article I, §9, cl. 7 of the Constitution of the United States in pertinent part:

"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

The Fifth Amendment to the Constitution of the United States in pertinent part:

"No person shall be . . . deprived of life, liberty or property without due process of law"

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE HYDE AMENDMENT

§210 of Pub. L. 95-480, 92 Stat. 1586 (1978):

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the preg-

nancy were carried to term when so determined by two physicians."

THE ILLINOIS STATUTES

P.A. 80-1091, ILL. REV. STAT. ch. 23, §5-5 (1977 Supp.):

"The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, ILL. REV. STAT. ch. 23, §6-1 (1977 Supp.):

"Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, ILL. REV. STAT. ch. 23, §7-1 (1977 Supp.):

"Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child."

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS

Pertinent provisions of the Medicaid Title of the Social Security Act, 42 U.S.C. §§1396 and 1396a (1976), are set forth in the Intervenor's Appendix at App. 1-3. Pertinent provisions of the implementing regulations 43 Fed. Reg. 57,253 (1978) (to be codified in 42 C.F.R. §440.230) are set forth in the Intervenor's Appendix at App. 7.

QUESTIONS PRESENTED

I. Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?

II. Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III. Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly

the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?

IV. Whether the State of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?

STATEMENT OF THE CASE

(1) On June 27, 1977, the Illinois General Assembly passed Public Act 80-1091 to amend §§5-5, 6-1 and 7-1 of the Illinois Public Aid Code, which was originally approved April 11, 1967. P.A. 80-1091 was vetoed September 13, 1977, but became law on November 17, 1977, upon a vote by two-thirds of the legislature to override the gubernatorial veto. It provided that public funds would not be expended for abortions unless the abortions were necessary to preserve maternal life.

(2) On December 6, 1977, Plaintiff-Appellees (hereinafter "Plaintiffs") filed a class action suit in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin enforcement of the statute, claiming jurisdiction under 28 U.S.C. §§1331, 1343(3) and (4) (1976), and seeking relief under 42 U.S.C. §1983 (1976), 28 U.S.C. §2201 (1976) and Fed.R.Civ.P. 57. They alleged that P.A. 80-1091 violated their rights under the Medical Assistance Title ("Medicaid") of the Social Security Act, 42 U.S.C. §1396 *et seq.* (1976), the Ninth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. They filed a motion for a temporary restraining order or preliminary injunction.

(3) The Plaintiffs are David Zbaraz, M.D. and Martin Motew, M.D., physicians whose business includes performing abortions upon medicaid recipients; the Chicago Welfare Rights Organization which purports to represent the interests of medicaid recipients who desire to receive governmentally financed abortions whenever a physician considers them to be "medically necessary" but not necessary to preserve their lives, and who would not receive state funding for abortions under P.A. 80-1091; and Jane Doe, a member of the same class who at the time she joined the lawsuit alleged she was pregnant and desired to, but under P.A. 80-1091 would not, receive state funding for an abortion.

(4) The Defendant Appellants (hereinafter "Defendants") are Arthur F. Quern, Director of the Illinois Department of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the Illinois statute in question; Jasper F. Williams, M.D., an Ob-Gyn physician-taxpayer and former President of the National Medical Association who on a regular and recurring basis treats women who carry their pregnancies to term, and Eugene R. Diamond, M.D., a physician-taxpayer and a practicing pediatrician and Professor of Pediatrics. Drs. Williams and Diamond intervened in their capacity as physician-taxpayers who support the state policy articulated by P.A. 80-1091, who conscientiously objected to abortion and participation in abortion through use of their taxes in violation of the Hippocratic Oath, and whose economic interests are at stake since the outcome of this litigation may result in a loss of patients, both mothers and the children they carry. The United States intervened when the Hyde Amendment, an Act of Congress, was brought into issue.

(5) On December 21, 1977, the District Court issued a Memorandum Opinion and Order denying the Plaintiffs' motions for a temporary restraining order or preliminary injunction and abstained pending state court adjudication. Plaintiffs' motion in the District Court for an injunction pending appeal was denied the same day. On December 22, 1977, they appealed to the Seventh Circuit Court of Appeals.

(6) On January 11, 1978, the Court of Appeals granted the Plaintiffs' motion for injunction pending appeal. On March 15, 1978, the Circuit Court reversed the opinion of the District Court on the abstention issue, vacated the injunction pending appeal, and remanded the case to the District Court. On March 16, 1978, the Plaintiffs moved in the District Court for a temporary restraining order which on March 28, 1978, was denied *nunc pro tunc* as of March 17, 1978.

(7) On May 15, 1978, District Court Judge Alfred Y. Kirkland issued a Memorandum Opinion and Order denying Defendant Quern's motions to dismiss for want of jurisdiction and for summary judgment, and granting Plaintiffs' motion for summary judgment after finding that the Illinois statute was in conflict with the objectives of the Social Security Act.

(8) On May 23, 1978, both Defendant Quern and Intervening Defendants Diamond and Williams moved in the District Court for a stay pending appeal which was denied on that date. On May 23, the Plaintiffs moved in the District Court for entry of Final Judgment and Order. On May 24, 1978, Defendant Quern filed a notice of appeal in the District Court and the next day moved in the Circuit Court for a stay pending appeal. On May 30, Intervening Defendants filed a notice of appeal and applied to the Circuit Court for a stay pending appeal.

(9) On June 13, 1978, Plaintiffs filed a notice of cross-appeal from that part of the District Court opinion and order which allowed Drs. Diamond and Williams to intervene as Defendants. Also on June 13, Judge Kirkland entered an amended Final Judgment and Order. On June 15, 1978, the Court of Appeals denied the Defendants' motions for stay pending appeal.

(10) On June 23, 1978, Intervening Defendants applied for a stay pending appeal to United States Supreme Court Justice John Paul Stevens who denied it on June 27. On June 29, the same application was made to Chief Justice Warren Burger who denied it on July 5. On July 13, 1978, the Intervening Defendants and Defendant Quern separately filed notices of appeal from the District Court's amended Final Judgment and Order.

(11) On February 13, 1979, the United States Court of Appeals for the Seventh Circuit reversed the District Court's decision. In a Memorandum Opinion, the court stated that the District Court was correct in finding that the Illinois statute was in conflict with the objectives of Title XIX of the Social Security Act, but held that the Hyde Amendment was itself a substantive amendment to the Social Security Act and not simply a limitation on the use of funds for abortion. The Seventh Circuit remanded the case to the District Court with instructions to consider the constitutionality of both the Illinois statute and the Hyde Amendment. *See Quern Appendix at A-1 et seq.*

(12) At this time, the United States intervened pursuant to Fed. R. Civ. P. 24 because the constitutionality of an Act of Congress, the Hyde Amendment, was under attack. *See Quern Appendix at A-19 et seq.*

(13) In its Memorandum Opinion of April 27, 1979, as set forth in Quern Appendix at A-21 *et seq.*, and in its Final Judgment, Order and Injunction of April 30, 1979, as set

forth in Quern Appendix at A-43 *et seq.*, the District Court by Judge John T. Grady held that both the Act of Congress (the Hyde Amendment) and the Illinois statute (P.A. 80-1091) were unconstitutional as applied to medically necessary abortions prior to the point of fetal viability.

(14) Motions for Stay of the District Court's Final Judgment, Order and Injunction of April 30, 1979 were denied by the District Court on April 30, 1979. *See* Quern Appendix at A-41. Notice of Appeal to this Court was filed by the Intervening Defendants on May 2, 1979, and is set forth in Intervening Defendants Appendix at App. 9. On the same day the Intervening Defendants filed an Application for Stay Pending Appeal of the mandate of the United States District Court for the Northern District of Illinois, Eastern Division. The stay was denied by Mr. Justice Stevens on May 24, 1979. A subsequent application for stay was made to Mr. Justice Rehnquist on May 24. It was referred to the Court and denied on June 4, 1979.

(15) This appeal is taken by Intervening Defendants Williams and Diamond with respect to both the Final Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered February 13, 1979, and the Final Judgment, Order and Injunction of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 30, 1979.

THE QUESTIONS ARE SUBSTANTIAL

I.

Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?

The District Court held unconstitutional the Hyde Amendment which denies federal financial disbursement for abortions performed by physicians when they have deemed the fetus to be nonviable and the abortion to be "medically necessary." The District Court's holding was grounded in its "belief" that the Congress has "no legitimate interest in promoting the life of a nonviable fetus in a woman for whom abortion is medically necessary." Quern Appendix at A-21. This ruling was handed down even though the Plaintiffs had not attacked the constitutionality of the Hyde Amendment at any stage of the proceedings.

Whether funds shall be "drawn from the Treasury" is a matter within the sole discretion of the Congress. Article I, section 9, clause 7, United States Constitution; *State of Ohio v. U.S. Civil Service Commission*, 65 F.Supp. 776, 780 (S.C. Ohio 1946); *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937). Should a judicial order issue pursuant to the District Court decision requiring the federal government to expend funds to reimburse the states for abortions deemed "medically necessary," a most acute legislative-judicial conflict would be created. Even if an injunctive order does not issue, such a conflict would result since our system of federalism contemplates the deference of federal officials to a judicial declaration of unconstitutionality.

Article I of the Constitution, however, forbids disbursement of federal funds without explicit Congressional approval; the Hyde Amendment forbids use of public money for the purpose for which the District Court claims they must be allocated under the Fifth Amendment. Thus, the District Court decision portends and produces direct confrontation between the federal judiciary and the Congress over control of federal expenditures. Whether the District Court erred in declaring the Hyde Amendment unconstitutional, in view of the exclusive constitutional authority of the Congress to appropriate public funds from the Treasury, is clearly a substantial federal question which warrants plenary review.

II.

Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III.

Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?

The United States Court of Appeals for the Seventh Circuit construed the Hyde Amendment to effect substantive changes in the Medicaid Act (*See Quern Appendix at A-8*) and the District Court ruled on the Hyde Amendment as construed by the Seventh Circuit. If it were the intention of Congress to effect substantive changes in Medicaid coverage, such changes would be a constitutional exercise of congressional legislative power.

The Illinois provision does substantively amend the Illinois public aid program. This amendment is a constitutional exercise of state lawmaking power.

Nonetheless, the District Court held unconstitutional the Hyde Amendment which had been enacted by Congress pursuant to the legislative power granted to Congress under the Constitution of the United States, and held unconstitutional a statute of the State of Illinois (P.A. 80-

1091) which limits funds to physicians who perform abortions except when necessary to preserve the life of the mother. The basis for this decision was the District Court's belief that the valid governmental interest in protection of the fetus expressed in social and economic programs must yield before the desire of a woman for an abortion coupled with a physician's conclusion that the abortion is "medically necessary."

The decision of the District Court is contrary to this Court's decision that the extent to which public funds shall be employed for abortion is a matter for democratic consensus expressed through elected officials. *Maier v. Roe*, 432 U.S. 464 (1977). The decision also contradicts *Poelker v. Doe*, 432 U.S. 519 (1977), wherein the Court said that the principle of democratic consensus applied to a policy promulgated by the mayor of St. Louis, which forbade abortion in the city's public hospital unless there existed "a threat of grave physiological injury or death." *Poelker v. Doe*, 432 U.S. at 520-521.

There is no constitutionally significant difference between the issue presently before this Court and the questions resolved in *Maier* and *Poelker*. Accord, *Woe v. Califano*, 460 F.Supp. 234 (S.D. Ohio 1978) (upholding the Hyde Amendment under the Constitution); *Freiman v. Walsh*, No. 77-4171-CV-C (W.D. Mo., filed Jan. 26, 1979); *D— R— v. Mitchell*, 456 F.Supp. 609 D. Utah 1978); *Doe v. Mundy*, 441 F.Supp. 447 (E.D. Wis. 1977).

The principle of democratic consensus which was applied in *Maier* and *Poelker* is applicable therefore in considera-

tion of the Hyde Amendment and Illinois P.A. 80-1091. The actions which Congress and the Illinois General Assembly have taken in enacting the Hyde Amendment and the Illinois statute were clearly within the scope of their legislative authority.

The legislatures acted pursuant to the right and duty to protect important government interests. In the present context, legislatures may rationally conclude that both the short-term and long-term costs of childbirth are less than similar costs for abortion. A detailed and heavily documented study [Hardy, *Privacy and Public Funding: Maier v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 Ariz. L. Rev. 903 (1976)] presents substantial evidence that availability of free abortion tends to decrease contraceptive use and increase pregnancies. This results in a shift of over-all costs which is not reflected by merely comparing the cost to government of a single abortion to that of a single birth.

More importantly, Congress and the State of Illinois have articulated a strong interest in the protection of fetal life and the encouragement of childbirth. Congress has chosen to implement this interest by an explicit statement of Congressional policy as expressed in the language of the Hyde Amendment limiting the types of abortions for which federal funds are available.

The interest in the protection of fetal life in federal social and economic programs has been the subject of protracted and heated Congressional debate for three years. The controversy over the present policy of the federal government with regard to funding medicaid abortions con-

sumes at least 513 pages of the Congressional Record.¹ Clearly, the funding priorities articulated through the Hyde Amendment were established with great forethought and serious deliberation by the Members of Congress. The Illinois policy in this regard was approved by over two-thirds of its General Assembly.

This Court has consistently recognized that it is within the competence of legislatures and not of courts to make decisions with respect to raising and disposition of public revenues. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The Constitution does not empower the judiciary to second-guess the funding priorities established by legislatures. *Steward Machine Company v. Davis*, 301 U.S. 548, 595 (1937).

Even when funding decisions involve "the most basic economic needs," this Court has declined to disturb legislative funding priorities in social and economic programs. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). As was

¹ 122 CONG. REC. S19437-46 (daily ed. Dec. 7, 1977), H12827-48 (Dec. 7, 1977), H12768-76 (Dec. 7), S19396-98 (Dec. 6), H12648-59 (Dec. 6), H12315 (Dec. 5), S19234-40 (Nov. 29), H12449-513 (Nov. 29), S19166-67 (Nov. 22), H12435 (Nov. 22), S18788-92 (Nov. 4), H12273-77 (Nov. 4), S18574-622 (Nov. 3), H12167-80 (Nov. 3), S18566 (Nov. 2), H12065-99 (Nov. 2), H12012 (Nov. 1), H11877 (Oct. 31), S17900-03 (Oct. 27), S17186 (Oct. 17), H11025 (Oct. 14), S17159-60 (Oct. 13), H10881-972 (Oct. 13), S17048-52 (Oct. 12), H10829-61 (Oct. 12), S16739-41 (Oct. 7), H10501 (Oct. 3), H10128-34 (Sept. 27), H10094-95 (Sept. 26), H9061 (Sept. 9), S13641-79 (Aug. 4), H8329-54 (Aug. 2), S13225 (Aug. 1), S11030-57 (June 29), S10919-22 (June 21), S10369 (June 21), S10177-78 (June 20), H6218 (June 20), H6082-99 (June 17), H6054 (June 16), S5669-896 (June 14), H5245-46 (June 1, 1977).

observed by the authority this Court cited in support of its decision in *Maher*:

... [W]hen extended sufficiently, judicial reduction of economic disparities reduces politics almost to a nullity. It is difficult to see how one's vote means anything if it is not a broad entrustment to legislatures of the power to raise and disburse, according to the wisdom of their priorities, the public funds.

Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945, 1010-1011 (1975). See *Maher v. Roe*, 432 U.S. at 479 n. 12.

The District Court held the legislative funding policy unconstitutional. The holding was based on a finding that the interest in the fetus expressed by several Congresses and the overwhelming majority of Illinois legislators was illegitimate because the legislative balance of priorities was "cruel." Quern Appendix at A-38.² The District Court found that the state interest became illegitimate even though this Court has stated that the valid state interest in the protection of the fetus exists throughout pregnancy. *Maher v. Roe*, 432 U.S. at 478.

² The District Court cites *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260-261 (1974) to support its belief that denial of physician reimbursement for abortions they deem necessary is "cruel." But this Court's judgment of the facts which attended *Maricopa County* depended upon the circumstances that all "serious illness [of the indigent traveler] would go untreated." *Id.* (Emphasis added.) In the instant case, it is an undisputed fact that forms of medical treatment other than abortion exist to treat health problems in pregnancy and that the state and federal programs will reimburse physicians who employ them.

The District Court's finding that the legislative balance was "cruel" was based upon the court's theory that the state's interest in protecting fetal life became illegitimate³ when continued pregnancy presented increased risks of maternal morbidity or mortality. Such a theory followed to its natural conclusion by some physicians would require funding of *all* abortions in the first trimester since some physicians believe childbirth poses a greater risk to maternal life and health than does abortion at that time. This would be contrary to the decision in *Maher* which did not require funding of all abortions.

Moreover, it is simply incorrect to assume that a withholding of funds for abortions will have the effect of increasing maternal morbidity and mortality; the evidence is to the contrary. Center for Disease Control, *Morbidity and Mortality Weekly Report*, Vol. 28, No. 4 (Feb. 2, 1979). This report was submitted by Intervening Defendants to the District Court.

³ The District Court's use of the concept of "legitimate state interest" is worthy of note. That court uses the concept of a "legitimate interest" in a conclusory sense, suggesting that a state interest is "legitimate" if it withstands constitutional scrutiny, whereas this Court has traditionally used the concept of the legitimate state interest as a departure point from constitutional analysis. See *e.g.*, *Roe v. Wade*, 410 U.S. 113, 162-164 (1973); *Maher v. Roe*, 432 U.S. at 478-479. According to the traditional use of the concept by this Court, a statute which protects a "legitimate state interest" may be unconstitutional if the *means* employed to protect this interest are not rational. But the legitimate interest does not cease to be legitimate even if the means of protecting it are not rational. Misuse of this concept resulted in the District Court's functioning more like a legislature than a court, for the District Court decided what funding priorities legislatures ought to have under the guise of determining whether state interests were legitimate or not.

When the District Court asserted that all abortions which physicians certify are "medically necessary" must be funded when the fetus is believed nonviable, it imposed a standard which was so hopelessly elastic that the state interest in the protection of the fetus might never be recognized. The "medically necessary" standard, which had been proposed by members of the Senate during the Hyde Amendment debates, was explicitly rejected by the full Congress as the practical equivalent of abortion on demand. As Rep. Silvio Conte, House Member of the Joint Committee which resolved the House-Senate conflict on the Hyde Amendment explained:

[A]n abortion could be performed as a matter of convenience as long as a doctor authorized it as a medical necessity. Physicians have already indicated that their interpretation of "medically necessary" means "an abortion that was requested by a woman." . . . Indications are that if this "medical necessity" loophole is allowed to stand, elective abortions will be performed under the guise of mental health. For example, when California liberalized its abortion law in 1968, 92 percent of the abortions done in the first year were for mental health reasons. In short, adopting this language would mean abortion upon demand.

123 CONG. REC. H10130 (daily ed. Sept. 27, 1977).

This Court has recently held in dealing with a similar standard:

"The very breadth of the potential reach . . . argues against the inference that Congress intended to require participating states to extend aid . . . A literal application . . . would create an entirely openended program, not susceptible of meaningful fiscal and programatic control by the states."

Quern v. Mandley, 436 U.S. 725, 745-746 (1978).

The District Court found the funding priority favoring childbirth over abortion unconstitutional even though this Court has already clearly stated that a state does have a legitimate interest in, and the power to encourage childbirth:

[*Roe v. Wade*] implies *no* limitation on the authority of the State to make a value judgment favoring childbirth over abortion and to implement that judgment by allocation of public funds.

Maher v. Roe, 432 U.S. at 474. (Emphasis added.)

In fact, the District Court has simply substituted its own judgment for that of the legislature in deciding that one interest of the state is more important than another. Some may believe that the well-being of the pregnant women should be preferred to the life of the human fetus growing within her in every case. Others believe that such a policy is unconscionably "cruel" to the unborn child. Our system contemplates that decisions of this nature be made through the democratic process. The extent to which public funds should be used to implement one or the other opinion is a legislative question properly resolved by the elected representatives of the people, not by the courts. The judiciary is not to strike down legislation simply because the judiciary believes it to be "unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). See also Justice Holmes' now vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905), cited by Mr. Justice Blackmun in the decision of *Roe v. Wade*, 410 U.S. at 117.

Valid and legitimate state interests do not become illegitimate and invalid simply because governments deny funds

to facilitate other, judicially preferred state interests. Otherwise, there is no obstacle to judicial control over all funding decisions. Under the District Court's theory of law, a court might properly overturn a congressional decision to build roads but not hospitals—should the judiciary deem more hospitals "necessary"—by simply declaring the federal interest in efficient transportation "illegitimate" in that employing limited public funds to encourage such efficiency deprives the population of "necessary" health care facilities. As this Court has held, however, government "decisions to spend money to improve the general welfare in one way and not another are 'not confided to the courts.'" *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

The District Court's decision has raised serious state-federal and legislative-judicial conflicts. It evidences not only opposition to the findings of Congress but also to the holdings and logic of this Court's prior abortion decisions. These substantial federal questions warrant plenary review.

IV.

Whether the state of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?

The Medicaid Title (Title XIX) of the Social Security Act was intended simply to *enable* the several states to pay for some of the medical services to be supplied to the indigent. 42 U.S.C. §1396 (1976); it was not designed to require the states to reimburse physicians for anything physicians might deem "medically necessary," especially

where the funding of the medical procedure would destroy other valid state interests. Moreover, Title XIX empowers the states to establish "reasonable standards . . . for determining . . . the extent of medical assistance . . . which . . . are consistent with the objectives of this [Title]." 42 U.S.C. §1396a(a)(17) (1976). Nevertheless, the Circuit Court in the instant case held that Title XIX and regulations issued pursuant to it required the states to fund abortions to an extent greater than Illinois had deemed reasonable. The Illinois statute, P.A. 80-1091, would fund only those abortions necessary to preserve maternal life.

The District Court found Illinois' funding policy was unreasonable despite Illinois' manifest interest in fiscal integrity and protection of fetal life and though the people of the State of Illinois did not wish their taxes employed for what many regard as an immoral purpose. In *Beal v. Doe*, however, this Court emphasized that in setting the standards for the extent of funding under Title XIX it was reasonable for the state to take into account its "significant state interest [in protecting the potentiality of human life] existing throughout the course of the woman's pregnancy," *Beal v. Doe*, 432 U.S. 438, 446 (1977). The same principle justifies the Illinois law here challenged.

When Title XIX became law in 1965, 46 of the 50 states, including Illinois, permitted only those abortions necessary to preserve maternal life. George, *Current Abortion Laws: Proposal and Movements for Reform*, 17 West. Reserve L. Rev. 371, 375-379 nn. 21-24, 31, 43, 44, 45 (1965). It is therefore clear that Congress could not have intended at the time of passage to *require all* states to fund abortions beyond the extent that they were necessary to preserve maternal life.

Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage." *United States v. Wise*, 370 U.S. 405, 411 (1962). In *Beal*, 432 U.S. at 447, this Court observed that "when Congress passed Title XIX in 1965, nontherapeutic abortions were unlawful in most states," and concluded, "In view of the then-prevailing state law, the contention that Congress intended to *require*—rather than permit—participating States to fund nontherapeutic abortions requires far more convincing proof than respondents have offered." (Emphasis in original.)

Congress did not require that a state fund to the full extent any medical service which was legal within the state. In fact, Congress established no requirements as to what medical services the states must fund except the requirement that the state standards be reasonable.

Certainly, the Medicaid Title nowhere requires that all services any physician calls "medically necessary" be funded. The only two references to medical necessity therein, 42 U.S.C. §1396a (a)(10)(c)(i) (1976) and 42 U.S.C. §1396 (1976) (the Preamble) deal with conditions for eligibility, not mandates for services. *Roe v. Norton*, 522 F.2d 928, 933 (2d Cir. 1975); *Coe v. Hooker*, 406 F. Supp. 1072, 1081 (D.N.H. 1976). Even the Federal regulations issued pursuant to Title XIX allow the states to "place appropriate limits on a service . . ." 43 Fed. Reg. 57,253 (1978) (to be codified as 42 C.F.R. §440.230).

It is certainly within the power of the state under Title XIX to protect its valid state interests by allocating public funds to some and not to other medical services. To require the state to fund so-called "medically necessary" abortions is to force the state to encourage through economic support what subverts the very interest the state wishes to protect.

CONCLUSION

Accordingly, Appellants respectfully urge this Honorable Court to note jurisdiction in this case and summarily reverse the decisions below or set this case for plenary review with briefs and oral arguments on the merits.

Respectfully submitted,

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APPENDIX

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42 U.S.C.A. § 1396:

SUBCHAPTER XIX—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396. *Authorization of appropriations*

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

Aug. 14, 1935, c. 531, Title XIX, § 1901, as added July 30, 1965, Pub. L. 89-97, Title I, § 121(a), 79 Stat. 343, and amended Dec. 31, 1973, Pub.L. 93-233, § 13(a)(1), 87 Stat. 960.

Pertinent Provisions of 42 U.S.C.A. §1396a:

§ 1396a (a)(10)

§ 1396a. *State plans for medical assistance—Contents*

(a) A State plan for medical assistance must—

(10) Provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan

App. 2

of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

App. 3

except that (I) the making available of the services described in paragraph (4), (14), or (16) of section 1396d(a) of this title to individuals meeting the age requirements prescribed therein shall not, by reason of this paragraph (10), require the making available of any such services, or the making available of such services of the same amount, duration, and scope, to individuals of any other ages, (II) the making available of supplementary medical insurance benefits under part B of subchapter XVIII of this chapter to individuals eligible therefor (either pursuant to an agreement entered into under section 1395v of this title or by reason of the payment of premiums under such subchapter by the State agency on behalf of such individuals), or provision for meeting part or all of the cost of deductibles, cost sharing, or similar charges under part B of subchapter XVIII of this chapter for individuals eligible for benefits under such part, shall not, by reason of this paragraph (10), require the making available of any such benefits, or the making available of services of the same amount, duration, and scope, to any other individuals, and (III) the making available of medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in clause (A) to any classification of individuals approved by the Secretary, with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment shall not, by reason of this paragraph (10), require the making available of any such assistance, or the making available of such assistance of the same amount, duration, and scope, to any other individuals not described in clause (A);

42 U.S.C.A. § 1396a(a)(13):

(13) provide—

(A) (i) for the inclusion of some institutional and some noninstitutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title, and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least—

(i) the care and services listed in clauses (1) through (5) of section 1396d(a) of this title or

(ii) (I) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan include hospital or skilled nursing facility services, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hospital services from such hospital or skilled nursing facility services from such facility, and

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, con-

sistent with section 1320a—1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan, except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as the reasonable cost of such services for purposes of subchapter XVIII of this chapter; and

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary;

42 U.S.C.A. § 1396a(a)(17):

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as deter-

mined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;

42 U.S.C.A. § 1396 a(a)(19):

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients;

42 U.S.C.A. § 1396 a(a)(22):

(22) include descriptions of (A) the kinds and numbers of professional medical personnel and supporting staff that will be used in the administration of the plan and of the responsibilities they will have, (B) the standards, for private or public institutions in which recipients of medical assistance under the plan may receive care or services, that will be utilized by the State authority or authorities responsible for establishing and maintaining such standards, (C) the cooperative arrangements with State health agencies and State vocational rehabilitation agencies entered into with a view to maximum utilization of and coordination of the provision of medical assistance with the services administered or supervised by such agencies, and (D) other standards and methods that the State will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality;

43 Fed.Reg. 57,253 (Dec. 7, 1978) (to be codified in 42 C.F.R. 440.230):

TEXT OF REGULATION

Title 42, Part 440, of the Code of Federal Regulations is amended by reinserting the words "arbitrarily" and "such criteria as" in § 440.230, revising that section to read as follows:

§ 440.230 *Sufficiency of amount, duration, and scope.*

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required

service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

(Sec. 1102 of the Social Security Act (42 U.S.C. 1302).)

Dated: November 28, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on
their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,
Plaintiffs,

v.

No. 77 C 4522

RECEIVED

May 2 1979

H. Stuart Cunningham, Clerk
United States District Court

ARTHUR F. QUERN, Director, Illinois Department of
Public Aid, Defendant,

and

JASPER F. WILLIAMS, M.D. and EUGENE F. DIAMOND, M.D.,
Intervening Defendants,

and

THE UNITED STATES,

Intervening Defendant.

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. appeal to the United States Supreme Court pursuant to 28 U.S.C. §1252 from the following judgments, holdings, orders and decrees of this named action:

1. Appeal is taken from the Final Judgment and Order of this court entered in this action by Judge John F. Grady

dated April 30, 1979 whereby this court adjudged an Act of Congress and certain Illinois statutes partially unconstitutional, enjoining the Illinois statutes in part. The laws so adjudged and enjoined state:

"The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, §5-5 (1977 Supp.).

"Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, §6-1 (1977 Supp.).

"Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are

necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, §7-1 (1977 Supp.).

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two Physicians." §210 of Pub. L. 95-480, 92 Stat. 1586, Oct. 18, 1978, the "Hyde Amendment," an Act of Congress.

The Final Judgment and Order of this court herein appealed were fashioned pursuant to the Memorandum Opinion of this court in this named action by Judge John F. Grady of April 27, 1979, holding the "Hyde Amendment and P.A. 80-1091 are unconstitutional as applied to medically necessary abortions prior to the point of viability". Memorandum Opinion, at 13.

2. Appeal is also taken from the Judgment and Order of the United States Court of Appeals for the Seventh Circuit, dated February 13, 1979, in *Zbaraz et al. v. Quern et al.*, Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029, fashioned pursuant to the Opinion of the Seventh Circuit (dated and titled in the same manner as the Final Judgment and Order), where the Seventh Circuit held P.A.

80-1091 inconsistent with Title XIX of the Social Security Act (Medicaid), 42 U.S.C. §1396 *et seq.*, insofar as P.A. 80-1091 failed to provide state funds for abortion to the extent 201 of Public Law 95-480 amended Title XIX.

3. Appeal is also taken from the Injunction issued by this court by Judge Alfred Y. Kirkland, in this named action, dated February 13, 1979, fashioned pursuant to the Mandate, Final Judgment, Order, and Decision of *Zbaraz et al. v. Quern et al.*, Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029 (7th Cir., Feb. 13, 1979), enjoining P.A. 80-1091 in the following manner:

"Pursuant to the mandate of the Court of Appeals for the Seventh Circuit contained in its Judgment and Opinion of February 13, 1979, this Court hereby modifies its permanent injunction entered on May 15, 1978 to provide:

This Court hereby orders that defendant be permanently enjoined from:

(1) enforcing Ill. Rev. Stat. Supp. (1977) ch. 23, §§5-5, 6-1, 7-1 to deny payments under the Illinois medical assistance programs to plaintiffs Zbaraz, Motew, and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for: (a) abortions when the life of the mother would be endangered if the fetus were carried to term; (b) such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service; and (c) abortions in those instances where severe and long-lasting physical health damage to the mother would

result if the pregnancy were carried to term when so determined by two physicians, or to deny such payments on behalf of any such indigent pregnant women for such abortions; (2) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that the abortions and medical procedures described in para. (1) are not, or will not be, a covered (reimbursable) service under the Illinois medical assistance programs.

The remainder of the permanent injunction of May 15, 1978 and the definitions contained therein remain in full force and effect with the exception of para. (d) [containing the definition of "therapeutic"] which is hereby deleted."

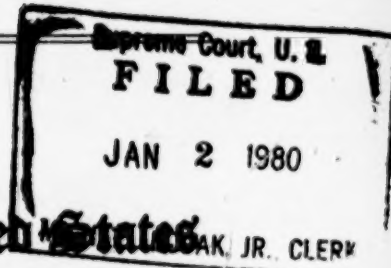
Respectfully submitted,

JASPER F. WILLIAMS, M.D.
EUGENE F. DIAMOND, M.D.
Intervening Defendants

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Chicago IL 60601
312/263-5386

APPENDIX



IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-4, 79-5 and 79-491

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
Appellants,

v.

DAVID ZBARAZ, et al.,
Appellees.

JEFFREY C. MILLER, Acting Director, Illinois Department
of Public Aid, et al.,
Appellants,

v.

DAVID ZBARAZ, et al.,
Appellees.

UNITED STATES,
Appellant,

v.

DAVID ZBARAZ, et al.,
Appellees.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES
FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Jurisdictional Statements of Williams and Miller filed July 2, 1979.
Jurisdictional Statement of United States filed September 21, 1979.
Jurisdiction Postponed until Hearing on Merits: November 26, 1979.

INDEX

Item		Page
1.	Chronological List of Relevant Docket Entries ...	1
2.	Opinions, Decisions, Judgments and Orders appearing in the Appendices to the Jurisdictional Statements	8
3.	Complaint, filed December 5, 1977.....	9
4.	Affidavit of Oren Richard Depp III, filed December 12, 1977	28
5.	Affidavit of David Zbaraz, M.D., Exhibit B, attached to Plaintiffs' Reply Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction filed December 15, 1977	38
6.	Affidavit of Martin Motew, M.D., Exhibit C attached to Plaintiffs' Reply Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction filed December 15, 1977	40
7.	Illinois House of Representatives, Transcript of Debate on House Bill 333 (May 4, 1977), Addendum I to Brief of Plaintiffs-Appellants, filed March 16, 1978	42
8.	Illinois House of Representatives, Transcript of Debate on House Bill 333 (June 27, 1977), Addendum J to Brief of Plaintiffs-Appellants, filed March 16, 1978	53
9.	Illinois House of Representatives, Transcript of Debate on House Bill 333 (November 3, 1977), Addendum K to Brief of Plaintiffs-Appellants, filed March 16, 1978.....	65
10.	Illinois Senate, Transcript of Debate on House Bill 333 (November 17, 1978), Addendum L to Brief of Plaintiffs-Appellants, filed March 16, 1978	82
11.	Plaintiffs' Motion for Leave to Have Jane Doe Joined as Party Plaintiff, for Leave to Have Her Proceed Under a Pseudonym, and for Leave to File a Supplemental Pleading, filed April 25, 1978.....	89
12.	Plaintiffs' Amended and Supplemental Pleading, filed April 25, 1978.....	93
13.	Affidavit of Jasper F. Williams, M.D., Designation of Affidavit, filed April 26, 1978.....	97

<u>Item</u>	<u>Page</u>
14. United States Department of Justice's Correspondence to Judge Kirkland requesting permission to intervene, filed March 8, 1979.....	100
15. Intervening Defendants' Motion for Summary Judgment, filed March 23, 1979	101
16. Affidavit of Oren Depp, Exhibit C, Exhibits to Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction, filed March 28, 1979	102
17. Affidavit of Peter Barglow, Exhibit D, Exhibits to Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction, filed March 28, 1979	113
18. Affidavit of David Zbaraz, Exhibit E, Exhibits to Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction, filed March 28, 1979	123
19. Defendant's Motion for Summary Judgment, filed March 30, 1979	133
20. Letter from the United States Department of Justice, filed April 3, 1979	135
21. Affidavit of Kenneth H. Wilson, attached to Defendant Quern's Reply Brief, filed April 3, 1979	136
22. Center for Disease Control, <i>Morbidity and Mortality Weekly Report</i> , February 2, 1979, Vol. 28, No. 4, Exhibit 1, Memorandum of Defendants Williams and Diamond in Opposition to Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction, filed April 19, 1979	138
23. Defendant Quern's Motion to Require Federal Reimbursement for All Medically Necessary Abortions, filed April 30, 1979	143
24. Intervening Defendants' Notice of Appeal, filed May 2, 1979	146
25. Defendant's Amended Notice of Appeal, filed May 8, 1979	151
26. Federal Intervenor's Notice of Appeal, filed May 29, 1979	154
27. Order of the United States Supreme Court postponing the question of jurisdiction to the hearing of the cases on the merits and consolidating the appeals, dated November 26, 1979	156

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
12/6/77	Filed complaint.
12/6/77	Filed Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, with attachments.
12/6/77	Filed Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction with attachments.
12/6/77	Filed Plaintiffs' Motion to Proceed As a Class.
12/9/77	Filed Plaintiffs' Supplemental Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, and attachments.
12/12/77	Filed Designation of Affidavits and Statistical Data submitted by Plaintiffs in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction.
12/12/77	Filed Affidavit of Oren Richard Depp, III, M.D., with attachments.
12/12/77	Filed Affidavit of Louis G. Keith, M.D., with attachments
12/12/77	Filed Defendant's Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, with attachments.
12/13/77	Filed Petition to Intervene of Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., with attachments.
12/15/77	Filed Plaintiffs' Reply Memorandum to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction.
12/16/77	Filed Intervening Defendants' Answer to the Complaint.
12/16/77	Filed Objection by Intervening Defendants to Motion for Temporary Restraining Order and Preliminary Injunction; and Memorandum in support of Intervening Defendants' Objection to Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, with attachments.

<u>Date</u>	<u>Proceedings</u>
12/21/77	Filed Plaintiffs' Motion for Injunction Pending Appeal.
12/22/77	Enter Order dated December 21, 1977: Plaintiffs' Motion for an Injunction Pending Appeal is denied—Kirkland, J.
J.	
12/22/77	Filed Plaintiffs' Notice of Appeal and Designation of the Record on Appeal.
1/10/78	Filed Petition for Intervention as Party-Defendants; and Motion for Ruling on Petition to Intervene.
3/16/78	Filed Brief of Plaintiffs-Appellants (in U.S. Court of Appeals, 7th Circuit, No. 77-2290).
3/16/78	Filed Brief of Defendant Appellee (the U.S. Court of Appeals, 7th Circuit, No. 77-2290).
3/16/78	Filed Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., (U.S. Court of Appeals, 7th Circuit, No. 77-2290).
3/16/78	Filed Addendum to Brief of Plaintiffs-Appellants (U.S. Court of Appeals, 7th Circuit, No. 77-2290).
3/16/78	Filed Reply Brief of Plaintiffs-Appellants (U.S. Court of Appeals, 7th Circuit, No. 77-2290).
3/16/78	Filed Plaintiffs' Motion for a Temporary Restraining Order, with Exhibits A and B.
3/16/78	Filed Defendant's Motion to Supplement the District Court Record with Defendant's Appellate Brief.
3/21/78	Filed Defendant's Answer re: Complaint.
3/21/78	Filed Plaintiffs' Renewed Motion to Proceed as a Class.
3/21/78	Filed Defendant's Motion for Declaration that No Notice to Recipients is Required as a Result of the Dissolution of the Injunction Pending Appeal.
3/28/78	Filed Plaintiffs' Memorandum in Support of Motion to Proceed as a Class, Affidavit of Martin Motew, Affidavit of Zbaraz, Affidavit of Rosenow, Affidavit of Louis G. Keith.

<u>Date</u>	<u>Proceedings</u>
4/13/78	Filed Plaintiffs' Motion for Summary Judgment.
4/13/78	Filed Plaintiffs' Motion to Enjoin Defendant from Implementing P.A. 80-1091 without Providing Adequate Notice to Recipients.
4/13/78	Filed Defendant's Motion to Withdraw Motion for Declaration that No Notice to Recipients is Required to Implement P.A. 80-1091, with Affidavit of David A. Rakov.
4/14/78	Enter Order dated April 13, 1978: Leave granted Defendant to Withdraw its Motion for Declaration that No Notice to Recipients is Required to Implement P.A. 80-1091—Kirkland, J.
4/14/78	Filed Defendant's Response to Plaintiffs' Motion to Enjoin Defendants from Implementing P.A. 80-1091 and without Providing Adequate Notice to Recipients, with Exhibits A, B, & C attached.
4/19/78	Filed Applicants for Intervention's Reply to Plaintiffs' Memorandum in Opposition to Application for Intervention.
4/11/78	Filed Opinion from U.S.C.A., 7th Circuit, 77-2290.
4/11/78	Filed Certified Copy of Judgment Order from U.S.C.A., 7th Cir. March 15, 1978 Reversing and Remanding for Expedited Consideration.
4/25/78	Filed Defendant's Motion for Summary Judgment.
4/25/78	Filed Plaintiff Jane Doe's Motion for a Preliminary Injunction and Summary Judgment, with Affidavit of David Zbaraz.
4/25/78	Filed Plaintiffs' Motion for Leave to have Jane Doe Joined as Party Plaintiff, for Leave to have Her Proceed under a Pseudonym and for Leave to File a Supplemental Pleading with Affidavit of Zbaraz.
4/25/78	Filed Plaintiffs' Amended and Supplemental Pleading.
4/25/78	Filed Plaintiff Jane Doe's Motion for Class Certification.
4/26/78	Filed Affidavit of Jasper F. Williams.

<u>Date</u>	<u>Proceedings</u>
4/28/78	Filed Movants for Intervention's Motion for Summary Judgment.
5/1/78	Enter Order dated April 25, 1978: Enter Order granting Plaintiffs' Motion for Leave to have Jane Doe Joined as a Party Plaintiff and for Leave to File a Supplemental Pleading —Kirkland, J.
5/16/78	Enter Order dated May 15, 1978: Defendant's Motion to Dismiss for Want of Jurisdiction is denied. The Motion to Intervene by Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., is granted. Plaintiffs' Motions to Proceed as a Class are granted as above described. Plaintiffs' Motion for Summary Judgment is denied. The Court's resolution of prior motions makes consideration of the parties' arguments regarding notice requirements unnecessary—(DRAFT) —Kirkland, J.
5/19/78	Enter Judgment pursuant to Rule 58.
5/23/78	Enter Order dated May 23, 1978: Defendant's Motion for a Stay Pending Appeal is denied. Intervenor's Motion for a Stay Pending Appeal is also denied—Kirkland, J.
5/23/78	Filed Plaintiffs' Motion for Entry of Final Judgment and Order.
5/25/78	Filed Plaintiffs' Motion to Alter or Amend Final Judgment.
5/31/78	Filed Defendant Arthur F. Quern's Memorandum in Opposition to Plaintiffs' Motion for Entry of Final Judgment and Order.
6/19/78	Enter Order dated June 13, 1978: Enter Amended Final Judgment and Order (DRAFT)—Kirkland, J.
6/19/78	Enter Judgment pursuant to Rule 58.
6/22/78	Filed Defendant Quern's Motion for Partial Stay of the Final Judgment and Order of June 13, 1978.
6/23/78	Enter Order dated June 22, 1978: Defendant Quern's Motion for Partial Stay of Final Judgment and Order of June 13, 1978 is DENIED.—Kirkland, J.

<u>Date</u>	<u>Proceedings</u>
7/13/78	Filed Defendant's Notice of Appeal from the Final Judgment entered May 19, 1978 granting Plaintiffs' Motion for Summary Judgment.
7/13/78	Filed Intervening Defendants' Notice of Appeal from the Amended Final Judgment entered June 13, 1978 granting Plaintiffs' Motion for Summary Judgment.
7/26/78	Filed Plaintiffs' Cross-Appeal re: Order of June 13, 1978 and Rule 58 Judgment, Intervention as Defendants by Jasper Williams and Eugene Diamond, M.D.
2/14/79	Filed 2-13-79 Opinion Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029, from U.S. Court of Appeals 7th Circuit.
2/14/79	Filed 2-13-79 Certified copy of Order from U.S. Court of Appeals 7th Cir., dated February 13, 1979. . . . (I)T is ordered and adjudged by this Court that the judgment of the said district Court in these causes appealed from be and the same is hereby VACATED, with costs, and REMANDED, in accordance with the opinion of this Court filed this date.
2/15/79	Enter order dated February 15, 1979, modifying permanent injunction pursuant to the mandate of the Court of Appeals for the Seventh Circuit.
2/23/79	Filed 2-22-79 Plaintiffs' Interrogatories and Request for the Production of Documents.
2/23/79	Enter order dated February 22, 1979 pursuant to 28 U.S.C. § 2403(a), this Court hereby certifying to the Attorney General of the United States that the constitutionality of an Act of Congress has been drawn into question. —Kirkland, J.
3/6/79	Filed 3-6-79 Notice of Filing, and Defendant Quern's Response to Plaintiffs' Interrogatories and Request for Production of Documents.
3/8/79	Filed 3-8-79 U.S. Dept. of Justice's correspondence dated March 7, 1979 to Judge Kirkland requesting permission to intervene pursuant to 28 U.S.C. § 2403(a).
3/8/79	Enter order dated March 8, 1979 granting the request of the United States for permission to intervene pursuant to 28 U.S.C. § 2403(a) —Kirkland, J.

Date	Proceedings
3/23/79	Filed 3-22-79 Intervening Defendants' Motion for Summary Judgment.
3/23/79	Filed 3-22-79 Defendant's Brief in Support of Motion for Summary Judgment.
3/23/79	Filed 3-22-79 Plaintiffs' Motion for Summary Judgment and for an Injunction.
3/23/79	Filed 3-22-79 Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and for an Injunction.
3/23/79	Filed 3-22-79 Exhibits to Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction.
3/23/79	Filed 3-22-79 Defendant Quern's Memorandum of Law on the Constitutional Questions.
3/26/79	Filed 3-26-79 Federal Defendant-Intervenor's Memorandum in Support of the Constitutionality of the Hyde Amendment.
3/30/79	Filed 3-30-79 State Defendant's Motion for Summary Judgment.
4/3/79	Filed 4-2-79 letter (undated) from U.S. Department of Justice regarding Motion for Summary Judgment.
4/3/79	Filed 4-3-79 Reply Brief of Intervening Defendants Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., re: Illinois' refusal to fund all "Medically Necessary" Abortions.
4/3/79	Filed 4-3-79 Defendant Quern's Reply Brief.
4/3/79	Filed 4-3-79 Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment and for an Injunction.
4/11/79	Filed 4-11-79 Federal Defendant-Intervenor's Reply Memorandum.
4/19/79	Filed 4-19-79 Memorandum of Defendants Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., in Opposition to Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction.
4/24/79	Filed 4-20-79 Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction.
4/24/79	Filed 4-20-79 Memorandum of Defendants Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., in Opposition to Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction.

Date	Proceedings
4/24/79	Filed 4-20-79 Defendant's Memorandum in Opposition to Motion for Temporary Restraining Order and/or Preliminary Injunction.
4/30/79	Enter Order dated April 29, 1979: Partial Summary Judgment is granted to Plaintiffs and Partial Summary Judgment is granted to Defendants (DRAFT)—Grady, J.
4/30/79	Filed 4-30-79 Defendants' Motion for Stay Pending Appeal.
4/30/79	Filed 4-30-79 Defendant Quern's Motion to Require Federal Reimbursement for All Medically Necessary Abortions.
4/30/79	Enter Order dated April 30, 1979: Hearing held on proposed Order. Motion of all Defendants for Stay Pending Appeal, denied. Motion by Defendant Quern to require federal reimbursement entered and taken under advisement. Enter Final Judgment and Order (DRAFT)—Grady, J.
4/30/79	Filed 4-30-79 Intervening Defendants' Motion for Stay.
4/30/79	Enter Order dated April 30, 1979: Motion by Intervening Defendants for Stay Pending Final Outcome of this Case Pending Appeal is denied —Grady, J.
5/2/79	Filed 5-2-79 Intervening Defendants' Notice of Appeal (Appeal to the U.S. Supreme Court from order of 4/30/79).
5/8/79	Filed 5-8-79 Defendant's Amended Notice of Appeal.
5/29/79	Filed 5-29-79 Federal Intervenor's Notice of Appeal to the U.S. Supreme Court.

**OPINIONS, DECISIONS, JUDGMENTS AND ORDERS
APPEARING IN APPENDICES TO
JURISDICTIONAL STATEMENTS**

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendices to the printed Jurisdictional Statements:

I. Appendix of Appellant Miller:

<i>Zbaraz v. Quern</i> , 596 F.2d 196 (7th Cir. 1979)	A1
Order modifying permanent injunction dated and entered February 15, 1979	A17
Order dated February 22, 1979 pursuant to 28 U.S.C. § 2403(a) certifying to the Attorney General of the United States that federal statute is at issue, entered February 23, 1979	A19
Order granting United States permission to intervene pursuant to 28 U.S.C. § 2403(a), dated and entered March 8, 1979	A20
<i>Zbaraz v. Quern</i> , 469 F. Supp. 1212 (N.D. Ill. 1979), Memorandum Opinion and Order, dated April 29, 1979, entered April 30, 1979	A21
Order denying Intervening Defendants motion for a stay dated and entered April 30, 1979	A41
Order denying motion of all Defendants for a stay pending appeal dated and entered April 30, 1979	A42
Final Judgment and Order dated and entered April 30, 1979	A43

II. Appendix of Appellant United States of America:

<i>Zbaraz v. Quern</i> , 572 F. 2d 582 (7th Cir. 1978)	74a
Memorandum Opinion and Order dated December 21, 1977 and entered December 22, 1977	91a

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**DAVID ZBARAZ, M.D., MARTIN MO-
TEW, M.D., on their own behalf and
on behalf of all others similarly situ-
ated; CHICAGO WELFARE
RIGHTS ORGANIZATION, an Il-
linois not-for-profit corporation,**

Plaintiffs,

vs.

**ARTHUR F. QUERN; Director of the
Illinois Department of Public Aid,**

Defendant.

No. 77 C 4452

COMPLAINT

1. This action is brought as a class action. Plaintiffs include two physicians who as part of their practice regularly provide medically necessary abortions to indigent women. They seek to enjoin enforcement of Illinois statute P.A.80—(H.B. 333) effective December 15, 1977, claiming that it denies them and their indigent women patients needing medically necessary abortions their rights under the Social Security Act, and the Ninth and Fourteenth Amendments to the United States Constitution. H.B. 333 prohibits state public assistance payments for medically necessary abortions for women otherwise eligible for medical assistance because of their indigency. At the same time Illinois provides public assistance payments for all other types of medically necessary services to these women and all other eligible indigent persons.

2. This Court has jurisdiction over this action under:

(a) 28 U.S.C. 1343(3), (4); and

(b) 28 U.S.C. § 1331.

The amount in controversy in this action exceeds \$10,000, exclusive of interests and costs.

3. This action is authorized by 42 U.S.C. § 1983. Declaratory relief is authorized by 28 U.S.C. § 2201 and F.R.C.P. 57.

4. Plaintiff Martin Motew, M.D.:

(a) is a United States Citizen, and a resident of Chicago, Illinois;

(b) is a registered and licensed physician in Illinois, a board certified obstetrician and gynecologist, a member of the Department of Obstetrics and Gynecology at Michael Reese Hospital, Chicago, Illinois and a Clinical Instructor of Obstetrics and Gynecology at the University of Chicago.

(c) regularly performs and desires to continue to perform medically necessary abortions for pregnant women patients of his who, because of their indigency, are eligible for medical assistance under one of the medical assistance programs which Illinois funds pursuant to Ill. Rev. Stat. ch. 23, Art. V-VII (hereinafter "indigent women").

5. Plaintiff David Zbaraz, M.D.:

(a) is a United States Citizen and a resident of Chicago, Illinois;

(b) is a registered and licensed physician in Illinois, a board certified obstetrician and gynecologist, a member of the Department of Obstetrics and Gynecology at Michael Reese Hospital, Chicago, Illinois, and a Clinical Professor of Obstetrics and Gynecology at the University of Chicago;

(c) regularly performs and desires to continue to perform medically necessary abortions for his indigent women patients.

6. Plaintiffs Motew and Zbaraz bring this action as a class action on their own behalf and on behalf of all others similarly situated, pursuant to F.R.C.P. 23(a), (b)(2). The class is

defined as all registered and licensed physicians in Illinois who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for medical services under the Illinois medical assistance programs as defined in paragraph 11. The class is hereinafter referred to as the "physician class." It is so numerous (exceeding 200 persons) that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class, and the named plaintiffs will fairly and adequately protect the interests of the class. The defendant has acted and is acting on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief, with respect to the class as a whole. Named plaintiffs and members of the physician class also assert the rights of all their pregnant women patients in Illinois eligible under the Illinois medical assistance programs who are denied assistance for abortions pursuant to H.B. 333, and are thereby unable to secure or are impeded from securing medically necessary abortions which they seek. These pregnant women are hereinafter referred to as "aggrieved women patients."

7. Plaintiff Chicago Welfare Rights Organization ("CWRO") is an Illinois not-for-profit corporation consisting of, and operated by, persons eligible for federal and/or Illinois state public assistance benefits, including benefits under the Illinois medical assistance programs. The purpose of the organization is to assist its members by, *inter alia*, advising them and helping them vindicate their legal rights, including rights under the United States Constitution and Social Security Act. Its members, all of whom depend on the Illinois medical assistance programs to meet their medical needs, include those for whom abortions have been and will be medically necessary and who are imminently threatened with denial of assistance for abortions pursuant to H.B. 333 and thereby imminently face being unable to secure or being impeded from securing medi-

cally necessary abortions which they seek. The group of aggrieved women patients include or will include all such CWRO members. CWRO represents its own interests and those of all such members.

8. Defendant Arthur F. Quern is Director of the Illinois Department of Public Aid ("IDPA"), the state agency charged with administration of medical assistance programs under the Illinois Public Aid Code, Ill. Rev. Stat. ch. 23 Art. V-VII. As such he is charged with enforcing, and is enforcing, H.B. 333.

9. The Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, is a cooperative federal-state medical assistance program providing for medical services to certain families and individuals whose income and resources are insufficient to meet the costs of necessary medical care and services. Illinois participates in the Medicaid program. Under the program the federal government contributes a substantial share of the cost of providing necessary medical care and services, while the state contributes the remainder. States participating in the Medicaid program must comply with the Social Security Act provisions and federal regulations governing the Medicaid program.

10. Under its Medicaid program, Illinois must—

cover all medically necessary services for eligible recipients, required to be provided to them pursuant to 42 U.S.C. § 1396a(a) (13).

... include reasonable standards ... for determining eligibility for and the extent of medical assistance under the plans which ... are consistent with the objectives of this [Medicaid program] ... 42 U.S.C. 1396a(a)(17)

provide such safeguards as may be necessary to assure that ... care and services will be provided in a manner consistent with ... the best interests of the recipients. 42 U.S.C. § 1396a(a)(19)

[provide] standards and methods that the state will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality. 42 U.S.C. § 1396a(a)(22)(D)

Specify the amount and/or duration of each item of medical and remedial care and services that will be provided ... Such items must be sufficient in amount, duration and scope to reasonably achieve their purpose. With respect to the required services for ... the State may not arbitrarily deny or reduce the amount of duration or scope of, such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition. Appropriate limits may be placed on services based on such criteria as medical necessity ...

42 C.F.R. § 449.10(a)(5)(i) [former 45 C.F.R. §§ 249.10(a)(5)(i)]

11. Illinois has also established two medical assistance programs for persons in Illinois who are ineligible to participate in the Medicaid program. These programs provide payments for necessary medical care and services as follows:

(a) The State General Assistance Program ("GA"), Ill. Rev. Stat. ch. 23, 6-1 *et seq.*, provides such payments on behalf of persons who qualify for and receive cash assistance benefits under the State-funded General Assistance Program;

(b) The Aid to the Medically Indigent Program ("AMI"), Ill. Rev. Stat. ch. 23 §§ 7-1 *et seq.*, provides such payments on behalf of persons in Illinois whose income is sufficient to disqualify them from participation in a state or local General Assistance Program, but is insufficient to meet the costs of their necessary medical care and services.

The Medicaid, GA and AMI programs are herein collectively referred to as the "Illinois medical assistance programs."

12. Illinois has statutorily stated the purpose of the Illinois medical assistance programs to be as follows:

Medicaid

to provide a program of essential medical care and rehabilitative services for [eligible] persons ... Ill. Rev. Stat. ch.22 § 5-1.

General Assistance

[to provide] any necessary treatment, care and supplies required because of illness or disability . . . Ill. Rev. Stat. ch.23 § 6.1.

Aid to the Medically Indigent

"[to provide] Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care . . ." Ill. Rev. Stat. ch.23 § 7-1.

13. Under the Illinois medical assistance programs, medical providers such as physicians, hospitals and clinics are entitled to reimbursement for the cost of "covered" medical services rendered to patients eligible under that program pursuant to 42 U.S.C. § 1396d(Medicaid), and Ill. Rev. Stat. ch.23 §§ 6-2(G.A.) and 7-1(AMI).

14. H.B. 333 amends the Illinois Public Aid Code Ill. Rev. Stat. ch.23 Art. V-VII to:

eliminate abortions as medical assistance for which payment [under the Illinois medical assistance programs] will be authorized, unless in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman.

It also eliminates "induced miscarriages" or "premature births" as medical services for which payment will be authorized, except for those necessary for the "preservation of life of the mother" and "except [for] an induced premature birth intended to produce a live viable child . . . [where] such procedure is necessary for the health of the mother or her unborn child." A copy of the amendment is attached hereto as Exhibit A. As used herein, the term "medically necessary abortions" refers to those therapeutic abortions for which H.B. 333 denies reimbursement to members of the physician class and other medical providers. (The term does not include elective abortions: insofar as H.B. 333 denies reimbursement for elective abortions, plaintiffs do not claim that provision to be illegal.)

15. Except for medically necessary abortions, the Illinois Medicaid program "covers" medically necessary services of the following kinds: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services; (5) family planning services and supplies; (6) physicians' services; (7) medical care, or any other type of remedial care recognized under State law; (8) home health care services; (9) private duty nursing services; (10) clinic services; (11) dental services; (12) physical therapy and related services; (13) prescribed drugs, dentures, and prosthetic devices; (14) other diagnostic, screening, preventive, and rehabilitative services. Illinois provides comprehensive coverage for recipients under the GA and AMI programs comparable to that available under its Medicaid program.

16. Defendant Quern is currently enforcing H.B. 333 to deny reimbursement under the Illinois medical assistance program for all medically necessary abortions to (a) plaintiffs Motew and Zbaraz and all other members of the physician class (b) hospitals and clinics and (c) all other medical providers.

17. As long as Illinois reimbursed them for performing medically necessary abortions for indigent pregnant women, plaintiffs Motew and Zbaraz offered and performed such medically necessary abortions for such patients. They wish to continue providing medically necessary abortions for such patients.

18. For the indefinite future a large number of indigent pregnant women patients of Plaintiffs Motew and Zbaraz and other members of the physician class will require, and were it not for H.B. 333 would seek and obtain, medically necessary abortions other than those necessary for the preservation of their lives, but because of H.B. 333 will not seek, or, if they do seek, will not obtain such medically necessary abortions, thus endangering their health and lives.

19. The distinction required by H.B. 333 between abortions necessary for the preservation of the life of the women seeking them, and abortions necessary for the preservation of the health of the women seeking them is so vague, indefinite and uncertain that plaintiffs Motew, Zbaraz and members of the physician class are and will be unable in many instances reasonably to draw and apply the distinction.

20. The distinction required by H.B. 333 is so vague, indefinite and uncertain, that some aggrieved women patients for whom abortions are and will be necessary to preserve their lives, are and will be unable to secure such abortions.

21. H.B. 333, on its face, and as applied denies aggrieved women patients eligible for Medicaid, financial assistance for medically necessary abortions, and as such violates their rights under 42 U.S.C. § 1396a(a)(13)(17)(19)(22)(D), 42 C.F.R. § 449.10(a)(5)(i), and other implementing federal regulations.

22. H.B. 333, on its face, and as applied, deprives aggrieved women patients of rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment in that:

(a) its purpose is to interfere with and preclude the exercise of their protected privacy rights to make decisions regarding and to secure medically necessary abortions on the basis of private deliberation and consultation with and advice from their physicians.

(b) its effect is to infringe their protected privacy rights to secure medically necessary abortions, on the basis of private deliberation and consultation with and advice from their physicians to a degree not justified by any compelling or even minimally legitimate state interest;

(c) the distinction it makes between indigent persons needing medically necessary services (including all medically necessary services for women related to pregnancy), except medically necessary abortions, and indigent women needing medically necessary abortions, is not rationally

related to the purposes of the Illinois medical assistance programs, or to any other constitutionally permissible purpose;

(d) it constitutes an establishment of religion, and prohibits the free exercise thereof, in violation of the First Amendment to the Constitution, made applicable to the states by the Fourteenth Amendment.

23. H.B. 333, on its face and as applied, denies aggrieved women patients rights retained by them under the Ninth Amendment to the United States Constitution by:

(a) abridging their freedom of choice about decisions relating to, and their right of privacy concerning, procreation, to a degree not justified by any compelling or even minimally legitimate state interest;

(b) abridging their freedom to care for their health and person, and freedom from bodily restraint and compulsion, to a degree not justified by any compelling or even minimally legitimate state interest.

24. H.B. 333, on its face and as applied, denies plaintiffs Motew, Zbaraz, and all members of the physician class, reimbursement for necessary medical services rendered to their indigent women patients eligible for Medicaid, and interferes with their professional medical judgment as to the medically necessary and appropriate treatment of, and treatment in the best interests of such patients and as such violates their rights under 42 U.S.C. § 1396a(a)(13)(17)(19)(22)(D), 42 U.S.C. § 1396d, 42 C.F.R. §§ 449.10(a)(5)(i), and other implementing federal regulations.

25. H.B. 333, on its face and as applied, deprives plaintiffs Motew, Zbaraz and all members of the physician class of rights guaranteed by the equal protection and due process clauses of the Fourteenth Amendment in that:

(a) it impinges upon their rights to practice medicine according to professional medical judgment as to the medically appropriate and necessary treatment of their indigent women patients;

(b) the distinction it makes between physicians rendering medically necessary services for their indigent patients (including all medically necessary services for indigent women patients related to pregnancy) except medically necessary abortions, and physicians rendering medically necessary abortions is not rationally related to the purposes of the Illinois medical assistance programs, or to any other constitutionally permissible purpose.

26. H.B. 333, on its face and as applied, violates rights of plaintiffs Motew, Zbaraz, and all members of the physician class retained by them under the Ninth Amendment to the United States Constitution, in that it interferes with their freedom of choice relating to, and the free exercise of, their medical judgment as to appropriate and necessary medical treatment of their patients.

27. Unless defendant is restrained from the enforcement of H.B. 333, the aggrieved women patients, plaintiffs Motew and Zbaraz, and all members of the physician class will suffer irreparable injury.

28. There is no adequate remedy at law.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray that this Court;

A. Declare that H.B. 333, on its face, and as applied violates the rights of aggrieved women patients eligible for Medicaid, under 42 U.S.C. §§ 1396a(13)(17)(19)(22)(D) and 42 C.F.R. § 449.10(a)(5).

B. Declare that H.B. 333, on its face, and as applied violates plaintiffs Motew, Zbaraz and all members of the physician class their rights under 42 U.S.C. § 1396a (a)(13)(17)(19)(22)(D), § 1396d, and 42 C.F.R. § 449.10(a)(5).

C. Declare that H.B. 333, on its face, and as applied, violates the rights of aggrieved women patients, and plaintiffs Motew, Zbaraz, and all members of the physician class under the due process and equal-protection clauses of the Fourteenth Amendment and the Ninth Amendment to the United States Constitution.

D. Preliminarily and permanently enjoin defendant, his agents, his employees and all persons in active concert with them, from enforcing H.B. 333, or otherwise denying plaintiffs Motew, Zbaraz and members of the physician class, or any aggrieved woman patient payment with respect to the rendition of medical services related to medically necessary abortions.

E. Grant plaintiffs such other and further relief as it may deem appropriate, including attorneys' fees.

/s/ ROBERT E. LEHRER

One of Plaintiffs' Attorneys

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Attorneys for Plaintiffs Zbaraz and Motew.

80th GENERAL ASSEMBLY**STATE OF ILLINOIS****1977 and 1978**

INTRODUCED February 16, 1977, BY Leinenweber—Bradley, Collins, Kelly, Jack Davis, Tuerk, Jane Barnes, Beatty, Bennett, Bluthardt, Boucek, Don Brummet, Capparelli, Christensen, Conti, Cunningham, Darrow, Deuster, DiPrima, Domico, Doyle, John Dunn, Ebbesen, Giglio, Giorgi, Griesheimer, Dan Houlihan, Hudson, Huskey, Johnson, Kent, Kornowicz, Kosinski, Kozubowski, Kucharski, Lauer, Leverenz, Luft, Madigan, Mahar, Mautino, McAvoy, McBroom, McCourt, Meyer, Miller, Molloy, Mulcahey, Murphy, Neff, Pechous, Pullen, Reilly, Ryan, Schlickman, Schuneman, Sharp, C. M. Stiehl, Sumner, Terzich, Totten, Van Duyne, VonBoeckman, Waddell, Wall, Walsh, Williams, Winchester, Wolf and Yourell.

SYNOPSIS: (Ch. 23, pars. 5-5, 6-1, 7-1)

Amends the Illinois Public Aid Code to eliminate abortions as medical assistance for which payment will be authorized, unless in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman.

AN ACT to amend Sections 5-5, 6-1 and 7-1 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 5-5, 6-1 and 7-1 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, are amended, the amended Sections to read as follows:

(Ch. 23, par. 5-5)

Sec. 5-5. Medical services.) The Illinois Department, by rule, shall determine the quantity and quality of the

medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing home services; (5) physicians' services whether furnished in the office, the patient's home, a hospital, a skilled nursing home, or elsewhere; (6) medical care, or any other type of remedial care furnished by licensed practitioners; (7) home health care services; (8) private duty nursing service; (9) clinic services; (10) dental services; (11) physical therapy and related services; (12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in the diseases of the eye, or by an optometrist, whichever the person may select; (13) other diagnostic, screening, preventive, and rehabilitative services; (14) transportation and such other expenses as may be necessary; (15) any other medical care, and any other type of remedial care recognized under the laws of this State, *but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.* The preceding terms include nursing care and nursing home service for persons who rely on treatment by spiritual means alone through prayer for healing.

[The Illinois Department, by rule, may distinguish and classify the medical services to be provided in accordance with the classes of persons designated in Section 5-2.]

The Illinois Department shall establish such regulations governing the dispensing of health services under this Article as it shall deem appropriate. In formulating these regulations the Illinois Department shall consult with and give substantial weight to the recommendations of-

ferred by the Legislative Advisory Committee. The Department should seek the advice of formal professional advisory committees appointed by the Director of the Illinois Department for the purpose of providing regular advice on policy and administrative matters to the Illinois Department.

All dispensers of medical services shall be required to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, details and receipt of the health care provided to persons eligible for medical assistance under this Code, in accordance with regulations promulgated by the Illinois Department. The rules and regulations shall require that proof of the receipt of prescription drugs, dentures, prosthetic devices and eyeglasses by eligible persons under this Section accompany each claim for reimbursement submitted by the dispenser of such medical services. No such claims for reimbursement shall be approved for payment by the Illinois Department without such proof of receipt.

The rules and regulations of the Illinois Department shall require that a written statement including the required opinion of a physician shall accompany any claim for reimbursement for abortions, or induced miscarriages or premature births. This statement shall indicate what procedures were used in providing such medical services.

The Illinois Department shall require that all dispensers of medical services desiring to participate in the Medical Assistance program established under this Article to disclose all financial, beneficial, ownership, equity, surety or other interests in any and all firms, corporations, partnerships, associations, business enterprises, joint ventures, agencies, institutions or other legal entities providing any form of health care services in this State under this article.

The Illinois Department shall develop and operate, in cooperation with other State Departments and agencies and in compliance with applicable federal laws and regu-

lations, appropriate and effective systems of health care evaluation and programs for monitoring of utilization of health care services and facilities, as it affects persons eligible for medical assistance under this Code. The Illinois Department shall report regularly the results of the operation of such systems and programs to the Legislative Advisory Committee on Public Aid to enable the Committee to ensure, from time to time, that these programs are effective and meaningful.

(Ch. 23, par. 6-1).

Sec. 6-1. (Eligibility requirements.) Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions of Sections 6-1.1 through 6-1.6. *Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.*

Until August 1, 1969, children who require care outside their own homes, where no other sources of funds or insufficient funds are available to provide the necessary care, are included among persons eligible for aid under this Article. After July 31, 1969, the Department of Children and Family Services shall have the responsibility of providing child welfare services to such children, as provided in Section 5 of "An Act creating the Department of Children and Family Services, codifying its powers and duties, and repealing certain Acts and Sections herein "named", approved June 4, 1963, as amended.

(Ch. 23, par. 7-1).

Sec. 7-1. (Eligibility requirements.) Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Sections 7-1.1 through 7-1.3, *except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.*

STATE OF ILLINOIS }
 COUNTY OF COOK } ss.:

VERIFICATION

DAVID ZBARAZ, M.D., being first duly sworn upon his oath, states that he is a plaintiff in this cause and has thoroughly and carefully read the above and foregoing "Complaint" and that the statements contained therein are true to the best of his information, knowledge, and belief, and that he has executed the same as his free act and deed.

/s/ DAVID ZBARAZ, M.D.

DAVID ZBARAZ

SUBSCRIBED AND SWORN TO
 before me this 5th day of December, 1977.

/s/ LOIS BINKLEY

STATE OF ILLINOIS }
 COUNTY OF COOK } ss.:

VERIFICATION

MARTIN MOTEW, M.D., being first duly sworn upon his oath, states that he is a plaintiff in this cause and has thoroughly and carefully read the above and foregoing "Complaint" and that the statements contained therein are true to the best of his information, knowledge, and belief, and that he has executed the same as his free act and deed.

/s/ MARTIN MOTEW

MARTIN MOTEW

SUBSCRIBED AND SWORN TO
 before me this 5th day of December, 1977.

/s/ LOIS BINKLEY

UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

vs.

ARTHUR F. QUERN, etc.,

Defendant.

No. 77 C 4452

AFFIDAVIT

OREN RICHARD DEPP, III, M.D., being duly sworn, states as follows:

1. I am a resident of Chicago, Illinois. If called as a witness, I would testify to the facts stated herein based on my personal knowledge and on the medical literature and statistical data which are cited herein and which are recognized in the medical profession as reliable.

2. I am Director of the Division of Obstetrics and Chairman of the Perinatal (High-risk Pregnancy) Center at Prentice Women's Hospital and Maternity Center of Northwestern Memorial Hospital in Chicago, Illinois. I am also Associate Professor in the Department of Obstetrics and Gynecology ("ob/gyn") and Head of the Section of Maternal-Fetal Medicine at Northwestern University Medical School in Chicago. I am licensed to practice medicine in the states of Illinois, Pennsylvania, Washington and Louisiana. I am board certified in the specialty of ob/gyn, which is the area of medicine concerned with the reproductive care of women. In

addition, I am board certified in maternal-fetal medicine, which is a sub-specialty of ob/gyn concerned with the care of high-risk pregnancies. In order to be board certified, a physician must pass oral and written examinations after practicing a specified number of years in the specialty (4 years of post-graduate study plus two years of specialized practice for ob/gyn; 5 years of specialized practice for maternal-fetal medicine). There are approximately 90 board certified physicians in the sub-specialty of maternal-fetal medicine in the United States. A complete description of my medical qualifications and publications is attached hereto (Appendix 1).

3. I have practiced medicine in my specialty and sub-specialty since 1963. During the time I was Director of the Fetal-Maternal Intensive Care Unit at Magee Womens Hospital in Pittsburgh, Pennsylvania, I was primary consultant for some 30,000 patients; since I have been at Prentice Women's Hospital and Maternity Center, I have supervised the perinatal health care for some 6,000 patients. I have personally examined several thousand women patients, including women who have desired to terminate their pregnancies. Many of my patients are poor, and many receive medical assistance from the State of Illinois. I have evaluated women for "life-saving" abortions prior to the legalization of abortion in 1973. I have also examined, and presently examine, pregnant women to evaluate health risks of their pregnancies. As Chairman of the High Risk Pregnancy Center at Prentice, I direct the delivery of special, intensive health care services for women with high-risk pregnancies, in order to minimize the risks to them of childbirth and to enable them to carry their pregnancies safely to term.

4. In preparing this statement, I have, in addition to my own experience in and knowledge of the matters stated, read the following articles, which I find to be accurate and reliable and which are considered to be authoritative and reliable in my profession:

Pettiti and Cates, "Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age," 67 *Am. J. Public Health*, No. 9 (September, 1977), pp. 860-62 (particularly for ¶ 5 of my statement). Appendix 2.

Weaver and Inui, "Information about Health Care Providers Among Urban Low Income Minorities," XII *Inquiry* (December, 1975), pp. 330-343 (particularly for ¶17 of my statement. Appendix 3.)

Osofsky, Rizk, Fox and Mondanaro, "Nutritional Status of Low Income Pregnant Teenagers," 6 *Journal of Reproductive Medicine*, No. 1 (January, 1971), pp. 52-56 (editorial pages 29-33) (particularly for ¶s 16 and 17 of my statement). Appendix 4.

Department of Health Education, and Welfare, Office of the Secretary, *Memorandum: Adolescent Pregnancy and Related Issues* (August 4, 1977), selected portions (particularly for ¶16 of my statement). Appendix 5.

Battaglia, Frazier, and Hellegers, "Obstetric and Pediatric Complications of Juvenile Pregnancy," *Pediatrics* (November, 1963) pp. 902-10 (particularly for ¶16 of my statement.) Appendix 6.

National Academy of Sciences, Institute of Medicine, *Legalized Abortion and the Public Health: Summary and Conclusions* (May, 1975) (particularly for ¶s 5 and 6 of my statement) Appendix 7.

5. Abortions performed under appropriate medical conditions during the first trimester of pregnancy are far safer—in terms of maternal morbidity and mortality—than childbirth. Approximately 18 in 100,000 women die as the result of childbirth, while fewer than 2 in 100,000 women die as the result of first trimester abortions. Second trimester medical abortions are not as safe as abortions performed during the first trimester, but are about as safe as childbirth. As the term of pregnancy lengthens, abortions become less safe. The decreased safety (or increased danger) is measurable from each week to the next. After the 12th week of pregnancy, the risk increases linearly.

6. For pregnant women with medical conditions or diseases which pose a risk to their health, the danger of childbirth is significantly greater than indicated by the figures in the previous paragraph. However, a medical abortion remains about as safe for such women as it is for women generally.

7. I have been informed that the State of Illinois will reimburse providers under its medical assistance programs for abortions only where such abortions "are necessary to preserve the life" of the pregnant woman. I could not be certain how to evaluate a patient for an abortion under this standard. Medical decisions cannot be approached in terms of certainties. A patient must be evaluated in terms of probabilities and risks (which the State of Illinois' standard does not set forth). Rarely can a physician determine that an abortion is clearly necessary to preserve the life of a pregnant woman. The standard, moreover, is vague as to whether childbirth must result in immediate death to the woman or just shorten her life to some degree.

8. To the extent that the standard enunciated in the previous paragraph means that it is more probable than not that pregnancy and childbirth would result in the woman's immediate death, a very small number of pregnant women—less than 10 in 10,000—would meet this standard.

9. In this statement, I attempt to give only exemplary rather than exhaustive descriptions of medical conditions or diseases which pose a risk to the health of the pregnant woman. An exhaustive list would require volumes of description. These types of conditions, existing alone or in combination, must be evaluated on a case-by-case basis by the examining physician. Where they exist together with a firm wish by the patient to terminate the pregnancy, such termination, in my opinion, would be medically-indicated (or "medically necessary" or "therapeutic").

10. A pregnant woman with such a medical condition or disease who is not motivated to carry her pregnancy to term will fare far worse, in terms of her physical health, if she is required to carry her pregnancy to term, than a woman with the same condition or disease who desires to continue her pregnancy. It has been my experience that these women will not obtain necessary health care during their pregnancies or will delay obtaining such care beyond a critical time. This is true whether the health risk involves a serious condition, such as diabetes, or a less serious condition, such as protein—or iron-deficiency. These women thereby often increase the risk to their health posed by pregnancy. Diabetic patients are notorious examples of such increased risk to health, because diabetes control is related to patient motivation. Pregnant diabetics who are not motivated to carry their pregnancy to term frequently refuse to control their diet appropriately and often refuse necessary hospital stays during their pregnancies or sign out of hospitals prematurely against the advice of their physicians.

11. Some of the same medical conditions or diseases which would pose a threat to a woman's life, if her pregnancy were carried to term, could, in milder form, be characterized as posing a threat to her health (if her pregnancy were carried to term). The characterization of health-threatening or life-threatening depends on the severity of the condition or disease and on the gestational age during which a physician observes the patient. Where such a condition poses a risk to health rather than life in the short term, the effect of pregnancy and childbirth is to accelerate the condition and, in many cases, to shorten the woman's life expectancy. A few examples of such conditions are: chronic lung disease (childbirth accelerates the deterioration of the lung function), essential hypertension (pregnancy may increase the likelihood of pre-eclampsia, a medical complication of pregnancy characterized by significant elevation of the blood pressure in the presence of significant protein loss in the urine and edema, which in turn accelerates

the likelihood of vascular disease and the risk of a cerebral-vascular accident, of brain, vessel and kidney damage, and increased incidence of diabetes), diabetes (pregnancy has an adverse affect on eye changes in a diabetic and on kidney function), heart disease (particularly mitral stenosis—the most common cardiac complication associated with pregnancy), sickle-cell disease (SS hemoglobin and SC hemoglobin—pregnancy can accelerate the frequency and severity of sickle-cell crises), and renal (kidney) disease.

12. Furthermore, not all medical conditions or diseases which would become life-threatening if the pregnancy were carried to term are predictable to any degree of certainty during the first trimester of a woman's pregnancy. Some such conditions appear at first as health-threatening rather than life-threatening, and there is no way to predict in any individual case whether the condition will become life-threatening until well after the first trimester of pregnancy, and often not until after the 28th week, when it is too late to perform an abortion safely. Examples of such conditions include cardiac problems, essential hypertension and diabetes. Both essential hypertension and protein deficiency are statistically associated with pre-eclampsia (see ¶11) which is one of the leading causes of maternal mortality (in childbirth), but there is no way to predict, in any individual case, that pre-eclampsia might occur. Diabetics are particularly prone to infection (one of the other leading causes of maternal mortality), and, therefore, childbirth poses a serious risk to the diabetic patient, but there is no way to predict the likelihood that any individual diabetic patient will develop infection during childbirth.

13. I have been informed that federal law will fund abortions under the Medicaid program where a pregnancy, if not terminated, would result in *severe* and *long-lasting* physical health damage to the pregnant woman. But neither severity nor duration of physical health damage is predictable in many particular circumstances. Even where a physician can, during

the first trimester of pregnancy, predict that a medical condition or disease would result in physical health damage to a woman (if the pregnancy were carried to term), the severity of such physical health damage cannot be predicted. For example, as previously stated, pregnancy poses a risk of physical health damage to a patient suffering from essential hypertension or malnutrition. But whether these conditions are likely to result in pre-eclampsia and, thus, *severe* physical health damage in a *particular patient* is impossible to predict. Nor can a physician predict whether a particular patient likely to suffer physical health damage (if the pregnancy were carried to term) will suffer *long-lasting* physical health damage. In fact, no adequate follow-up (post-childbirth) studies have been conducted or morbidity statistics developed, and physicians, thus, probably underestimate the duration or permanent character of some physical health damage resulting from pregnancy and childbirth.

14. Not all medical conditions or diseases which create a risk to a pregnant woman's health are pre-existing conditions. They may, rather, arise for the first time during pregnancy, or, if they pre-date the pregnancy, are often undetected until pregnancy. For example, trophoblastic disease ("mole pregnancy"), a degenerative disease of the placenta with a high malignant potential, which affects one in 800 pregnancies, arises for the first time during pregnancy. Heart disease (particularly mitral stenosis) is often detected for the first time during pregnancy—when added stress is placed on the pregnant woman's heart.

15. Even when no medical conditions or diseases are present or develop during the initial period of pregnancy, a woman's age, economic status and ethnicity all affect the probabilities and risks posed by pregnancy. Here, too, however, a physician is often unable to predict with reasonable certainty the danger to a particular patient but must evaluate the statistical probabilities. For example, a woman who is over

35 years old and/or has had five or more children is considered a very high pregnancy risk—even if she has no pre-existing or developing medical conditions or diseases. Statistics show a significant increase in the likelihood of such a woman's developing hemorrhage, heart disease, and hypertension, to name a few, as the result of pregnancy and childbirth. This is because the stress on the cardiovascular and metabolic systems and the endocrine changes brought on by pregnancy tend to unmask or accelerate conditions brought on by the aging process. If, in addition, this woman wanted to terminate her pregnancy, I would—absent medical indications to the contrary—consider such termination to be medically indicated—even though I could not predict the likelihood of danger to this particular woman—because of the statistical probabilities of health or life compromise.

16. Adolescent females under the age of 16 and older adolescents who are not fully developed comprise another age group for whom pregnancy poses a statistically higher health risk than it poses for women in general. Complications of pregnancy and childbirth are from 9 to 25% higher for this group than for women aged 20-24. For this category it is also often impossible to predict with reasonable certainty the danger to a particular patient. Adolescents suffer a high rate of pre-eclampsia (see ¶ 11, one of the leading causes of maternal mortality), as the result of pregnancy and childbirth. Adolescents are also more prone to develop anemia and malnutrition because their own developing systems are competing with the fetus for the same food supply. These conditions can create serious health risks in childbirth. For example, they can cause fetal malnutrition which would then require that childbirth be accomplished by caesarian section because the malnourished baby cannot withstand labor. Caesarian delivery is also advisable where the woman has a contracted (or under-developed) pelvis—a condition common to adolescents as well as to women under five feet tall. Caesarian section creates a greater risk to maternal life and health than does normal

childbirth (there is a risk of wound infection, pulmonary embolism, thrombophlebitis, as well as risks associated with anesthesia—aspiration, pneumonitis and seizures). Moreover, when a young woman has had one caesarian delivery, all of her future childbirths must be accomplished by caesarian because the process of labor creates a risk of tearing the scar tissue of the previous caesarian. Thus the health and life risk is compounded by the number of future childbirths.

17. Poor women—and especially poor, black women—comprise another high pregnancy risk group. Statistically they have or develop certain conditions during pregnancy which pose unique or more severe health problems as compared to the female population in general. And the maternal mortality rate is much higher for these women than for the female population generally. Some of the pregnancy risks resulting from these conditions are individually predictable; some are only statistically predictable. The conditions include, for example, anemia, malnutrition (especially protein-depletion), rheumatic heart disease, essential hypertension, which is more prevalent among the poor, black population, and sickle-cell disease, which is almost unique to the black population. A few effects of pregnancy and childbirth on some of these conditions have been previously described (pre-eclampsia is associated with essential hypertension as well as malnutrition; malnutrition may also result in caesarian delivery; sickle-cell disease can result in more severe and frequent sickle-cell crises). In addition, anemia can result in a decreased ability of the blood to carry oxygen to vital tissues. Another important factor in evaluating pregnancy health risks to poor women is the crucial importance of bed-rest during pregnancy to minimize risks posed by various conditions or diseases. Pregnancy and childbirth create a far greater health risk for a poor woman with a relatively mild condition of any sort who is unable to get extra bed-rest due to familial or job demands (or because she is unable to obtain outside help with chores or children) than for a woman with the identical condition who is able to obtain

extra bed-rest. The stress to the system caused by pregnancy will accelerate the condition where simple bed-rest is unavailable to compensate for the stress. Another problem more prevalent among the poor population is lack of access to, and utilization of, adequate health care facilities. Chicago has adequate facilities to accommodate approximately 6,000 high risk pregnancies annually; yet there are well over 10,000 such pregnancies in the city each year. (Chicago also has the highest prenatal and maternal mortality rate of any city in the United States.) The poor population of course bears the brunt of this inadequacy. Moreover, poor women, as a group, have a far lower rate of utilization of health care facilities—even where such facilities are available—than the female population generally.

/s/ OREN RICHARD DEPP, III

Oren Richard Depp, III

SUBSCRIBED AND SWORN TO
before me this 12th day of December, 1977.

/s/ KATHLEEN M. EVANS

Notary Public

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, et al.,

Plaintiffs,

v.

ARTHUR F. QUERN,

Defendant.

Civil Action
No. 77 C 4522

AFFIDAVIT OF DAVID ZBARAZ, M.D.

DAVID ZBARAZ, being duly sworn, states as follows:

1. I am 39 years old and a plaintiff in the above case.
2. I am an obstetrician and gynecologist, practicing at Michael Reese Hospital in Chicago, Illinois.
3. Michael Reese Hospital maintains a pregnancy termination unit ("PTU"), which is staffed on a rotating basis by members of the Department of Obstetrics and Gynecology.
4. I have been a member of the PTU since its inception in 1973. During 1977, I performed pregnancy terminations (abortions) in the PTU one or two days per month.
5. In 1977 I performed an average of about six abortions for my patients in the PTU during each day that I was on call there.
6. Approximately 40% of the patients for whom I performed abortions in the PTU during 1977 were public aid recipients receiving assistance under the Illinois Medical Assistance Programs ("public aid recipients"), and approximately 35% of those abortions were ones I deemed medically necessary to preserve the health of the women.

7. Prior to the effective date of the cutoff of Illinois Medical Assistance Program funds for abortions, Michael Reese Hospital was reimbursed by the Illinois Department of Public Aid for abortions performed for public aid recipients.

8. For each abortion I performed for a public aid recipient, Michael Reese Hospital paid me \$60.00 from the funds it received from IDPA.

9. I desire to continue performing medically necessary abortions for patients receiving assistance under the Illinois Medical Assistance Program, but Michael Reese Hospital cannot and will not provide facilities for abortions for indigent patients without reimbursement from public funds.

/s/ DAVID ZBARAZ, M.D.

DAVID ZBARAZ, M.D.

SUBSCRIBED AND SWORN TO
before me this 13th day of December, 1977.

/s/ LOIS BINKLEY

(Notary Public)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, et al.,

Plaintiffs,

v.

ARTHUR F. QUERN,

Defendant.

Civil Action
No. 77 C 4522

AFFIDAVIT OF MARTIN MOTEW, M.D.

MARTIN MOTEW, M.D., being duly sworn, states as follows:

1. I am 35 years old and a plaintiff in the above case.
2. I am an obstetrician and gynecologist, practicing at Michael Reese Hospital, Chicago, Illinois.
3. Michael Reese Hospital maintains a pregnancy termination unit ("PTU"), which is staffed on a rotating basis by members of the Department of Obstetrics and Gynecology.
4. I am a member of the PTU at Michael Reese Hospital. During 1977 I performed pregnancy terminations (abortions) in the PTU one or two days per month for patients on an outpatient basis.
5. In 1977 I performed an average of about six abortions for my patients in the PTU during each day that I was on call there.
6. Approximately 40% of the patients for whom I performed abortions in the PTU during 1977 were public aid recipients receiving assistance under the Illinois Medical Assistance Programs ("public aid recipients"), and approximately 35% of those abortions were ones I deemed medically necessary to preserve the health of the women.

7. Prior to the effective date of the cutoff of Illinois Medical Assistance Program funds for abortions, Michael Reese Hospital was reimbursed by the Illinois Department of Public Aid ("IDPA") for abortions performed for public aid recipients.

8. For each abortion I performed for a public aid recipient, in 1977, Michael Reese Hospital paid me \$60.00 from the funds it received from IDPA.

9. I desire to continue performing medically necessary abortions for patients receiving assistance under the Illinois Medical Assistance Programs, but Michael Reese Hospital cannot and will not provide facilities for abortions for indigent patients without reimbursement from public funds.

/s/ MARTIN MOTEW, M.D.

MARTIN MOTEW, M.D.

SUBSCRIBED AND SWORN TO
before me this 13th day of December, 1977.

/s/ LOIS BINKLEY

(Notary Public)

**Illinois House of Representatives, Transcript of Debate
on House Bill 333 (May 4, 1977)**

SPEAKER REDMOND: "Three three three. Representative Leinenweber. Would you read the Bill, Mr. Clerk?"

CLERK HALL: "House Bill 333, a Bill for an Act to amend Sections of the Illinois Public Aid Code, Third Reading of the Bill."

SPEAKER REDMOND: "Leinenweber."

LEINENWEBER: "Thank you, Mr. Speaker. House Bill 333 is a relatively simple Bill. It eliminates . . . briefly, it eliminates state payment for abortions under the Medical Assistance Program of the Department of Public Aid unless the physician certifies that the abortion is necessary to protect the life of the mother. House Bill 333 does not raise the question of whether a woman has a right to have an abortion. The issue is, 'as a matter of public policy of the State of Illinois . . . to pay for abortions that are not medically necessary'. Conceding that at the moment there are at least five Supreme Court Justices who have stated that the woman's right to privacy is broad enough to include the decision whether to abort. It does not follow that the taxpayers must pay to enable her to fulfill this right. We have many rights guaranteed under the Constitution, including the Fourth Amendment . . . Many of these rights are not funded. For example, we have a right to interstate travel but we don't get free bus tickets. We have a right to a free press, but we don't have free printing payments. We have a right to assemble but no one pays for the right to rent a hall. We have a right to read what we want in the privacy of our homes but the state does not pay for pornography. We have a right to cosmetic surgery but the state does not pay for hair transplants. The state, through its exercise of public policy, decides what right it should fund. For example, we have a right to elementary and secondary education and the State of Illinois fulfills that right by funding, one hundred percent through state and local government, our right to elementary and secondary

education. House Bill 333 seeks to set public policy by drawing a line on payments for nonmedically necessary surgery. To my knowledge the only nonmedically necessary surgery now paid by the state is abortions. They do not pay for hair transplants, they do not pay for facial uplifts. It is urged by some that denial of state public aid for nonmedically necessary abortions is a denial of the Constitutional rights of a poor woman. First, her Constitutional right is not to an abortion but to the right of privacy. It is none of the state's business whether she and her doctor decide to have an abortion. It does not follow that the state must pay for what is none of its business. It is urged by others that it is a denial of due process to pay for some medical costs but not others. The state currently makes no pretense of paying for any and all medical procedures. The question is, if there is one at all, is there rational distinction between . . . medically necessary and medically unnecessary surgery? To state the question is to answer it. In conclusion, House Bill 333 seeks to set public policy that the state ought not to pay for nontherapeutic medically unnecessary abortions. There are millions of Illinois taxpayers who believe deeply that nontherapeutic abortions are morally objectionable. These feelings are to be recognized in the public policy of this state. I urge your support for House Bill 333."

SPEAKER REDMOND: "Representative Bradley."

BRADLEY: "Thank you, Mr. Speaker. Mr. Speaker and Ladies and Gentlemen of the House, I rise to support this piece of legislation and make a few comments in support of my Cosponsor's remarks, Mr. Leinenweber. Mr. Speaker and Ladies and Gentlemen of the House, nowhere . . . nowhere in the Supreme Court's 1973 abortion decision did that majority report assert that the right to be free from legal restraints in deciding on . . . and obtaining an abortion, carried with it a duty on the part of the state to pay for the abortion when a pregnant woman could not afford one. The expressed will of Congress, Ladies and Gentlemen, contained . . . in the so-called

Hyde Amendment, to the HEW Labor Appropriations Act of October 1976, is that the Federal Government is not . . . is not to pay for abortions . . . with tax moneys. Their will has been disregarded by Federal Judge John Duley's decision to stay enforcement of the ban which decision was allowed to stand at least temporarily by the U.S. Supreme Court. The Federal Constitution gives to Congress alone the power to appropriate money from the U.S. Treasury. It seems clear that the Supreme Court must ultimately bow to the will of Congress on this matter and I hope that they do that very shortly. If the state and or . . . the Federal Governments pay for the exercise of . . . Constitutional Rights, as Representative Leinenweber indicated, all the other rights that we have, are we expected to fund those rights also? It is worth . . . adding note . . . that the right to abortion was only recently discovered by the Supreme Court. It is certainly not one of the framers of our Constitution. They certainly did not see fit to include it. Also, Ladies and Gentlemen of the House, pregnancy is not an illness. An abortion is not just another medical procedure. It is an elective surgery undertaken to relieve stresses which are nearly always social, economic or psychological. Seldom physical to the point of threatening a pregnant woman's life. We have heard that it has been charged with House Bill 333 and its Federal counterpart are discriminatory towards the poor. If the state is required to make accessible to the poor all those commodities that the wealthy can afford on their own then the Treasurer had better girt up for the onslaught. In 1973, pardon me, in 1975 . . . HEW paid something like fifty million dollars for welfare abortions. We tried to get the figures on what it was costing the State of Illinois and we could not come up with an accurate figure but we know it runs into millions of dollars. This kind of money, Ladies and Gentlemen, could go a long way toward alleviating the conditions that sometimes make abortions seem like the only way out of a difficult situation. In particular the difficulty that a pregnant unmarried woman has in obtaining relief until she has delivered her baby is not only deplorable but it is often the deciding factor for a woman who

is on the fence between abortion and carrying a baby to full term. The question Ladies and Gentlemen, is not on the abortion issue, but the question on House Bill 333 is whether the state was going to pay for those abortions and I urge the support of House Bill 333."

SPEAKER REDMOND: "Representative Hudson."

HUDSON: "Thank you . . . thank you, Mr. Chairman and Ladies and Gentlemen of the House. This particular kind of Bill and the subject is of course inclined to be or apt to be, an emotional one and it would therefore seem to me to be in the interest of all to address myself to the rational and reasonable basis behind House Bill 333, which I strongly support. The Bill seeks to cover the cost of only medically necessary procedures and not elective procedures. And . . . it would seem to me that to deny that the state may make distinctions between medically indicated abortions and non-medically indicated abortions in its social and economic programs, would be to deny to the legislative authorities and to all of us as Representatives, the right to make rational classification based on valid public interest. The issue seems to be also, whether the equal protection clause of the Federal Constitution has thrust upon Illinois an affirmative burden to pay for elective non-medically indicated abortions . . . if the state pays for any other cost arising from medical necessities and pregnancy. It would be foolish, I believe, to apply this strict scrutiny test of equal protection to the abortion funding question, and thus declare that because one has a fundamental right to abortion, which the courts have said women do, that the state must perforce and therefore finance it. This is so because there is no constitutional mandate that the state must finance the exercise of fundamental rights. Representative Leinenweber has already called your attention to other rights that are recognized as fundamental, but which at the same time the state is under no obligation to finance or to pay for it. I think this is essential to our understanding of this issue. I would conclude by simply

suggesting to you, my colleagues, that this is an entirely rational, constitutional, legal approach to a very difficult question and that the enactment of House Bill 333 seems to fall within the discretion granted the State of Illinois under Title IX, and in no way conflicts with a woman's abortion right under the United States Constitution. I commend Representative Leinenweber for the Bill, and other Sponsors, and recommend strongly that you think about it and you cast a green vote for this essential protective Bill. It's in the best interest of all of our taxpayers and all of our citizens. I urge you to vote 'yes' on 333."

SPEAKER REDMOND: "Representative Chapman."

CHAPMAN: "Mr. Speaker, I wonder if the Sponsor would yield to a question?"

SPEAKER REDMOND: "He will."

CHAPMAN: "Mr. Leinenweber, could you tell me . . . under your Bill, if it became law, what would happen if someone on public aid were raped or if there was incest occurring? Would your Bill provide for abortion under those circumstances?"

LEINENWEBER: "No."

CHAPMAN: "I think you said 'no' . . . Mr. Leinenweber?"

LEINENWEBER: "Correct. I said 'no'."

CHAPMAN: "Okay. Thank you. I have a further question. Has Bills such as yours, when they have been approved by other states, been upheld to your knowledge . . . by any of the courts?"

LEINENWEBER: "To my knowledge, there is only one . . . there is no definitive decision on this particular question. The . . . there is currently a district court injunction restraining the Department of Health, Education and Welfare from operating under the Hyde Amendment. That is the closest thing to a court decision. The district court decision of course only applies in that particular district."

CHAPMAN: "Mr. Leinenweber, my understanding was that there were three different instances where suits were brought and all three of these federal district courts issued restraining orders in regard to the so-called Hyde Amendment. Is that true to your knowledge?"

LEINENWEBER: "To my knowledge, the district court of New York has issued a restraining order, which means that in the opinion of a particular district court judge who was appointed . . . appointed judge . . . that in his opinion there was a question as to the constitutionality of the Hyde Amendment. . . . As far short of a definitive . . . point which you are leading up to is whether or not the Bill is Constitutional."

CHAPMAN: "May I speak to the Bill now, Mr. Speaker?"

SPEAKER REDMOND: "You may."

CHAPMAN: "Denial of funding for abortions under the Medical Assistance Program clearly discriminates against public aid recipients. Equal protection arguments have thus far been upheld in states that have attempted restrictions similar to those embodied in this Bill. Rape is a very real concern. It not only is a problem as far as information that we have but it is an under-reported crime. To deny to public aid recipients help under the law in these circumstances to me is absolutely unacceptable. Clearly, when this matter is before the courts now, it makes sense to defer any decision until the court has spoken and I do ask the Members of this House to vote 'no' on House Bill 333."

SPEAKER REDMOND: "Representative Peters."

PETERS: "Mr. Speaker, I move the previous question."

SPEAKER REDMOND: "The Gentleman has moved the previous question. The question is, shall the main question be put? Those in favor indicate by saying 'aye'; 'aye'; opposed 'no'; the 'ayes' have it. Representative Leinenweber to close . . . you all . . . to explain your vote."

LEINENWEBER: "Well, Mr. Speaker, in response to the last speaker's point about whether we should defer until there is a definitive court ruling. There's absolutely no reason in the world, when there is not a definitive court that we should not do something that is just and right. Since the state medical programs are presumably instituted to protect the lives and health of the poor, how does payment for elective medically unnecessary surgery serve the state's interest? Even setting aside the central moral question of feticide in every abortion, should the state be forced to pay for operations simply because some patients happen to want them? Millions of taxpayers happen to believe that there are better uses for our tax dollars than killing unborn children. I urge your support of House Bill 333."

SPEAKER REDMOND: "The question is, shall this Bill pass? Those in favor vote 'aye', opposed vote 'no'. Representative Barnes to explain his vote."

BARNES: "Mr. Speaker and Members of the House, in explanation of my vote, and I will try to be brief because my light was on from the very beginning of the debate and I wasn't allowed a chance to speak to the Bill. . . . It seems to me that there are some contradictions here. On the one hand . . . one of the proponents of this Bill . . . and I see it is going to pass . . . On the one hand he says that there was fifty million dollars spent for this purpose in the last fiscal year. But on the other hand . . . and I underline this . . . on the other hand, in this state, the only area in public aid that had a reduction in it, in this fiscal year, was Aid to Dependent Children. That was the only area that went down. One of the causes of that reduction is before us today, the prohibition that you are putting on medical service for poor. It seems to me that on the one hand if you say that the poor cannot receive medical services in this area, then on the other hand not appropriate sufficient amount of money for those families to live on, it seems to me that you are doing only one thing here, you're saying to them that they cannot receive services . . . medical services . . . that are provided for the population as a whole, but yet and still you will not provide for

them . . . the necessary funds for them to survive. It seems to me that if we're going to do something in that fashion, that there is only one alternative . . . is to fund these programs. To insure that the programs are sufficient for the people to survive on them or either allows them . . . allows them, in concert with all laws, with all federal courts, to be able to receive the same medical services that are available for all citizens in all walks of life . . . in our state and in our country. This state and this legislation has not been upheld by any court . . . by any court . . . in this state or by the Federal Government and I'm more than sure that it will not be upheld even though it will sell out of here with those 111 votes. When the public aid supplemental and the public aid appropriation come over, I'm going to remind each and every one of those 111 votes to insure that there are sufficient money to fund those public aid programs. I vote 'no'."

SPEAKER REDMOND: "Representative Gaines to explain his vote."

GAINES: "Mr. Speaker, Ladies and Gentlemen of the House, I wish to join my able colleague on the other side of the aisle who admonished these so-called frugal, thrifty minded Legislators . . . that when you get down to the whole bottom of the deal you are talking about spending three hundred dollars to our mother who says that I can't handle this child, an opportunity not to have a child that you'll have to support for twenty years on public aid, another twenty years in prison, and then the rest of its life on old age. The one thing that most cripples have in common be they millionaires or paupers, is that they feel that they are not wanted. I was a public aid worker for nine years and if a mother came and said, 'I can't handle this child.' She really means it. Do you, on one hand, force her to have the child and on the other, ask her to take care of it which she is not going to do? Then you are not going to appropriate sufficient funds to take care of that child in a foster home. You're not going to appropriate sufficient funds to take

care of that child in a mental institution. You're not going to appropriate sufficient funds to take care of that mother in a penal institution. You're not going to appropriate enough funds to do anything to support that child after it gets here. Yet you say you want to economize. I know you want to use the least of these as a whipping boys and girls. As the Good Lord says, 'As you do the least of these you do unto Me.' So I'm saying that all of you righteous folks when the time comes to pay the piper, remember you called the tune. So I'm voting 'no'."

SPEAKER REDMOND: "Representative Johnson."

JOHNSON: "Yes, Mr. Speaker and Ladies and Gentlemen of the House, in explaining my vote, there have been a variety of reasons given here for supporting or opposing this particular Bill. But I think when you strip away all of the reasons, in my opinion and in my mind in voting it, this is absolutely a right to life vote. I believe so strongly in the right of every person, including the unborn, to be free from the unnatural termination of its life that, notwithstanding the fact that the Supreme Court, in my opinion wrongfully and morally has taken away the right of the unborn to continue to live. This is an important step and at least one step that we can take and Constitutionally take to try to restore the right to life of every person. I think that for this Legislature to continue to appropriate money or allow money to the Department of Public Aid or elsewhere, to be used for abortions, is the same, in my opinion and I emphasize absolutely the same, as if we had a line item appropriation this year for a professional killer or a hit man to go out and eliminate people who are undesirable. I think it's that clear an issue and I think is a right to life issue and in that framework every Member of this General Assembly ought to rise in strong support of House Bill 333."

SPEAKER REDMOND: "Representative Willer."

WILLER: "Yes, Mr. Speaker and Ladies and Gentlemen of the House, I am voting 'present' today on this Bill. Two years ago in Committee, I voted against it because I was convinced it was discriminatory and therefore unconstitutional. I am voting 'present' today. I'll explain this to my constituents because this now is before the Federal Court and the Hyde Amendment will be decided by the Federal Court. If the Court upholds it and finds it constitutional so be it, we can then pass the Bill. I don't know how the court is going to rule. I suspect it will find it unconstitutional. I hope they don't. I'm against abortion, but I see no point in what I call a 'knee-jerk' reaction to the demands of our voters to be constantly throwing Bills in the courts. This is exactly what we're going to be doing with this one. It's very emotional, it so easy to vote 'yes' and please your constituents because I am a pro-life person. I think it is dishonest. I live under a constitution and I think we ought to wait for the Federal Courts to make the decision, which they will be doing shortly."

SPEAKER REDMOND: "Representative Corneal Davis."

DAVIS: "Mr. Speaker, Ladies and Gentlemen of the House, I'm happy to follow the distinguished Lady that . . . who spoke before me. I will not twist my logic to support my prejudice. Who interprets the law? We make the law but we do not interpret it. They might take into consideration the intent of the Legislature, but not the interpretation and you know that. You're simply whistling sand across the desert, and poking a finger of scorn at poor women who can't afford to pay for an abortion. Let the courts of this land continue to interpret the laws and let us continue to make laws. Always with a clear view in mind that this is one nation under God . . . with liberty and justice for all. This means poor, rich, white, black, blue or blind. That's why I'm voting 'no'. It's discriminatory and you know it."

SPEAKER REDMOND: "Representative Ryan."

RYAN: "Thank you, Mr. Speaker and Ladies and Gentlemen of the House. I'd like to interrupt here for a minute, if I may, to introduce the young man that's here to kickoff the Juvenile Diabetes Foundation drive for the Springfield region and he is with us here this afternoon. Mr. Jeff Vorderstrasse, from the Springfield area. Jeff is here with us today."

SPEAKER REDMOND: "Representative Kelly. Representative Kelly . . . Representative Pullen . . ."

PULLEN: "Mr. Speaker, Ladies and Gentlemen of the House, there is no doubt in my mind as to who is in charge of the spending of the State of Illinois and that is this Body and the Body across the hall. If we cannot control whether Medicaid funds shall be paid for abortions, who can? Certainly this is in our authority and we must act today to stop the use of public money for murder. I shudder to think about the public aid caseworkers whom we pressure all of the time to cut the caseload, counseling pregnant public aid mothers who are in an emotional moment and counseling them very possibly to have an abortion so that they don't increase the caseload. This is a horrible thought to my mind but I can see how it could very well happen. We must stop this murder. This genocide . . . if you will. I urge you to vote 'aye' on this very good Bill."

SPEAKER REDMOND: "Representative Neff."

NEFF: "Thank you, Mr. Speaker. I'd like to interrupt to introduce a school we have from the 47th District. Represented by Representatives McGrew . . . McMaster and myself. This is the Roseville School, sitting over in the . . . east balcony . . . and they are with Paul Stephenson, the Principal of the School."

SPEAKER REDMOND: "Have all voted who wish? The Clerk will take the record. On this question there's 119 'aye' and 41 'no'. The Bill having received the Constitutional Majority is hereby declared passed. Representative Geocaris."

**Illinois Senate, Transcript of Debate
on House Bill 333 (June 27, 1977)**

SECRETARY: House Bill 333.

(Secretary reads title of bill)

3rd reading of the bill.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Lemke.

SENATOR LEMKE: This amends the Illinois Public Aid Code to eliminate abortions as medical assistance for which payments will be authorized unless in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman. I ask for a favorable adoption.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Is there further discussion? Senator Carroll.

SENATOR CARROLL: Thank you, Mr. President, members of the Senate. I will keep it very brief. We discussed parts of this yesterday. I just want to again say that this action, in my opinion, is totally discriminatory for it does nothing to those who can afford to pay for this medical procedure and merely eliminates those who cannot afford to pay for it of their own funds and therefore, use public aid. We discussed very briefly the effects of this on public aid and the effects are very simple. Before the 1973 opinion of the Supreme Court, Cook County Hospital was receiving over four thousand people a year who had received abortions through some type of improper procedure and had to come in for medical services. It cost the hospital in those days, twenty-five hundred dollars per person for each of those four thousand people who had had already, had had abortions prior to coming into the hospital, over seven hundred of those people per year died, over seven hundred people of those per year died. Since 1973, they have been performing approximately thirty-two hundred per year, thirty-

two hundred abortions per year at a cost of two hundred and fifty dollars per person. So, I think you can see then instead of spending a little under a million dollars a year for this service, we, the people, are spending over ten million dollars a year for the results of the exact same service. We have not eliminated the service, we will just be paying ten times a year more. I might add that the Supreme Court opinion did not say, did not say, the State should not be providing monies for this. They did say, and I think Senator Lemke is correct in pursuing it, that the State may set the policy and that the Supreme Court will not review that policy. I think it is up to us to set the policy for the people of Illinois. I don't think it will do what many of those who support this want to do and that is to eliminate some of these abortions. There's only one way to do that and I think that is for each of us with a strong church and a strong family, strong counseling to advise each and every one of us who are ever in that situation as to how to best deal with it. I know what my personal choice would be and it would not be for an abortion. But, that does not change my objection to this legislation. I think it takes strong counseling with your clergy, with your family to make an intelligent decision. All this bill does is discriminate against those who can't afford to have the surgery performed in a hospital, forces them to go elsewhere and raises the cost twelve-fold to us, the taxpayers. I think it should be defeated.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Netsch.

SENATOR NETSCH: Thank you, Mr. President. Senator Carroll and I were privy to some of the same statistics and information about the experience in at least one area of the State, the number of septic abortions and the death rate that they, in fact, have caused also and I think he has pretty well set forth those statistics. It does not achieve what we think it is going to achieve. There will continue to be abortions, there will continue to be septic abortions, there will continue to be deaths -

on that account. And either on financial grounds, which I don't think ought to be the main consideration or on humanitarian grounds, it simply does not make sense. I think I might share two sentences from the dissenting opinion in the recent Supreme Court opinion. Because the opinion is not that of the usual, if I may use the expression, liberals on the court, but it's Mr. Justice Blackmun's opinion and I don't think he needs any credentials to demonstrate that he is a genuine conservative. Mr. Justice Blackmun said, "the court concedes the existence of a constitutional right, but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless as the courts opinions in three cases concede her to be, the result is punitive and tragic. Implicit in the courts holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of let them eat cake. There is another world out there, the existence of which the court, I suspect, either chooses to ignore or fears to recognize and so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and in so doing, would better the lot of the poorest among us."

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Washington.

SENATOR WASHINGTON: Will the sponsor yield to a question?

PRESIDING OFFICER: (SENATOR DONNEWALD)
Indicates he will.

SENATOR WASHINGTON: Senator Lemke, would not your bill prevent medical purveyors or doctors from giving adequate treatment to a victim of a rape case or to an incestuous relationship?

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Lemke.

SENATOR LEMKE: This bill is in conformity with the Supreme Court rule. It does not abolish therapeutic abortions. If it's up to the physician to decide if it's . . . if this will jeopardize the . . . the woman's life physically or mentally and . . . and this will not in any way affect that.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Washington.

SENATOR WASHINGTON: Then you interpret mental jeopardy to be the status, the mental status of . . . mental attitude of a raped woman or one who has been the victim of an incest, you interpret that language to cover this?

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Lemke.

SENATOR LEMKE: Yes.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Washington.

SENATOR WASHINGTON: Well, Mr. Speaker . . . Mr. President, it appears to me that's stretching the language quite far. A clear reading of House Bill 333 indicates quite clearly that if a person is on welfare and goes to a clinic or a hospital for treatment pursuant to a rape situation, or if an individual, the victim of an incestuous situation applies for the same kind of treatment, that this bill would effectively deny it. That seems to be . . . to me to be callous and extreme. How can you possibly ask, expect a woman to fertilize and give birth to a child, the offspring of rape or incest? I think it defies common sense and reason. It seems to me that the whole purpose of the Abortion Statute, which I don't necessarily subscribe to or the abortion laws, is to prevent just in a sense, this kind of thing. Even if I could agree with the full support of the Supreme Court decision or this bill, I could not stretch it to that extent. It seems to me that if it must pass, or if it will pass, at least, it must have some clearer exclusions from it than this. I think it's a horrible

bill as cast. I think it's going to do as Senator Carroll and Netsch have stated, is to increase the load. I think it's going to bring unnecessary psychological hardship to people such as I have categorized as the victims of rape and incest. I think it's a . . . a poorly conceived bill. I think it's a detriment to the State. I simply don't think the Senate of this great State of Illinois should subscribe to such a theory. I oppose the bill.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Do we have leave for the UPI to take still photographs? Leave is granted. Senator Rock.

SENATOR ROCK: Thank you, Mr. President and Ladies and Gentlemen of the Senate. I rise in support of House Bill 333 and I think unfortunately, the issue has been framed as to whether or not there should, in fact, be abortions. That is not the issue. We have passed, in this General Assembly, the Abortion Act of 1975 which was jointly sponsored by Senators Egan and Philip, which attempted to bring some medical sense to the fact of abortion and say that only under limits . . . limited circumstances only . . . only in . . . in closely medically controlled areas could an abortion be, in fact, allowed. That bill, in the provisions thereof, have been enjoined by Federal District Court. This bill . . . with or without this bill, abortions will continue, that is correct. But, to throw in the question as whether or not there should be abortion is just simply not correctly stating the issue. And to bring in the fact of rape and incest is simply not statistically valid. If you will talk to the people at County Hospital or any other major medical center that does, in fact, have abortions, few, if any, are as the result of rape or incest. The question before the Body by virtue of House Bill 333 is one of severe public policy. What are we going to allow the taxpayers' money in the State of Illinois to be used for? And I submit to you that the overwhelming majority of the people of the State of Illinois do not want their tax dollars used for abortions and that's the issue and I rise in support of House Bill 333.

PRESIDING OFFICER: (SENATOR DONNEWALD)
 Senator Maragos.

This is to certify that this is a true and exact copy of the transcript of the debate in the Senate on House Bill No. 333.

/s/ KENNETH WRIGHT

Kenneth Wright
 Secretary of the Senate

SENATOR MARAGOS: Mr. President, and members of the Senate, I rise in support of 333 after having been one of those who have kept that bill in committee until the Supreme Court made its decision a few weeks ago, my concern was, first of all, that it met the constitutional grounds, which now the Supreme Court says it has. But, my other concern is this, although I have stated all along that the State should keep out of the private business in many cases, even though I disagree with that opinion of whether a woman should have an abortion in the first trimester, which is the State's law at the present time. By the same token, however, I also say that the State should not encourage it by publicly financing this particular Act. There's where I stand, because now, we say it's all right for the State not to interfere when a woman desires to have it, for whatever reason, by the same token, we do say though they can help her when she decides to do something by financing her and it's unfortunate it has to be in the area of Public Aid that we're talking about, but I'm sure that if even a poor woman has . . . wants to obtain an abortion under the certain circumstances described by Senator Washington, she can find other eleemosynary institutions that will help her get that abortion and she doesn't have to depend on Public Aid. And for those reasons, I vote . . . I will vote in support of 333.

PRESIDING OFFICER: (SENATOR DONNEWALD)
 Senator Rhoads.

SENATOR RHOADS: Thank you. . . thank you, Mr. President, and members of the Senate. I also rise in support of the bill. I think Senator Rock has stated the issue very clearly. But, I don't think that anyone who has spoken on either side of this issue has spoken with insincerity. This is an issue that you simply cannot debate and change minds on. Either one accepts the premise that the unborn is a human life and therefore the termination of the child is an act of homicide, or one does not accept that premise. I do, and therefore can't vote any other way but yes on the bill.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Glass.

SENATOR GLASS: Well, Mr. President, Ladies and Gentlemen. I think that Senator Rhoads is right in one sense, that we're not going to change any votes and I think that's unfortunate. If we would look out into the real world, we would see that the public policy purportedly adopted by this bill is not going to in any way discourage abortions and in fact, it would encourage safety . . . when abortions are performed and as Senator Carroll has so eloquently point out . . . pointed out, there would be significant cost savings to the State. It really is difficult to justify this bill as I see it on any basis, certainly not a humanitarian one and I would urge its defeat.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Newhouse.

SENATOR NEWHOUSE: Would the sponsor yield to a question, please?

PRESIDING OFFICER: (SENATOR DONNEWALD)
He indicates he will.

SENATOR NEWHOUSE: If a minor child, for example, becomes a rape victim, and is taken to, let's say, Cook County Hospital, would this bill preclude medical procedure that would insure that she would not conceive a . . . a child unwanted?

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Lemke.

SENATOR LEMKE: If the . . . if the medical personnel at that hospital, or any hospital, determines that this is a . . . that she is in need of a therapeutic abortion, which is a medical determination and is not my determination, she can have it. This will not in . . . in any way reflect on her. Therapeutic abortion can be for physical or mental reasons and I . . . I think that this bill in no way will affect that.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Newhouse.

SENATOR NEWHOUSE: Would you read me the language in the bill that would permit such an occurrence to take place?

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Lemke.

SENATOR LEMKE: Well, the Supreme Court decision allows therapeutic abortions, if they're for emergency situations. If a young girl has been molested and raped and is pregnant and she's in a bad mental state, that abortion will be performed, based on medical testimony by the doctors and I'm looking for that . . . it says here on page 4, lines 19 to 26 is the clarifying language that says this, it's the opinion of a physician if such procedures are necessary for life for the preservation of life for the woman seeking such treatment or . . . so this is a . . . the language. This is a medical termination. I am not a doctor to determine this. This is up to something that happens and this bill does no way affect therapeutic abortions. It . . . it affects voluntary abortions, this is what it affects. Abortions that are performed in the second trimester also, which not even private citizens have.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Newhouse, your time is nearly expired.

SENATOR NEWHOUSE: But, the language that you read, Senator, does not cover the case that I posed to you. I did not suggest that the life would be in jeopardy at this stage. So, it appears to me that that case isn't covered by your bill.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Senator Lemke.

SENATOR LEMKE: I am not a doctor. I'm not the doctor ruling. Every case is held on its merits. The medical determination on every case, every factual situation. And I think this is what this bill allows to and this is what the Supreme Court says we can allow.

PRESIDING OFFICER: (SENATOR DONNEWALD)

Senator Newhouse, your time is expired. Please close.

SENATOR NEWHOUSE: Thank you, Mr. President. My time probably encompassed a lot of other things, but I don't mind yielding the Floor, but, I must say that I did not get an answer to the question that I posed. I'm satisfied with the answer as a nonanswer.

PRESIDING OFFICER: (SENATOR DONNEWALD)

Senator Wooten.

SENATOR WOOTEN: Yes, Mr. President. The point that Senator Newhouse made is an excellent one. A friend of mine in this Chamber tells me he votes for all capital punishment bills because they're all drafted in such haste, they're all unconstitutional and he feels comfortable that nothing will ever happen. I think here, we have a bill that enables us to express the . . . the rage, if you will, that people feel at abortion and at Public Aid. Wonderful when those two emotions can come together and you can get one vote and capitalize on both those feelings. But, the plain fact is, it says here, that except for such aid for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment and so on. It's a . . . you clearly left out two exceptions that have been in the law for a long time and the marvelous thing about this is . . . I believe, by the way, that we probably should have a Right to Life Amendment to the Constitution, but saving that, we're going to force somebody to live up to our ethics. If we can't get the public at large to do it, then by golly, we're going to make the poor do it. I just don't think that's a decent, responsible, human way to behave. And, the thing that really bothers me, is so many people are going to vote for this because it's too hard to explain a rational vote. And, I think we don't do ourselves of this whole process of service, and we vote on emotions. That's

precisely what's happening here. I do not believe in abortions but my ethics and my morals are not determined by what's written in the law, or is that true of anyone who has a true ethical system. And, the compulsion we feel on forcing our own ethics on others, is, I think, the least pleasant characteristic of many public officials. This bill is badly flawed and it's flawed in the very two ways that Senator Newhouse pointed out, Senator Washington pointed out, and that's reason enough to oppose it.

PRESIDING OFFICER: (SENATOR DONNEWALD)

Senator Lemke may close.

SENATOR LEMKE: Mr. President, and members of the Senate. The issue is upon us. It's a very important issue to my constituents. It's a very . . . very important issue to your constituents. This is something that my people have prayed for and helped try to pass. We have the Supreme Court ruling that says we can do this, it's constitutional. My constituents and your constituents are the people that pay the bills and they have many times quoted that they do not want their money used for purposes that they feel are immoral. We're talking about their money and this is what we're talking about. Some people reflect to me that we have . . . to have the child, it would cost more. Well, I'll tell you this, my people sacrificed all their lives to provide for their children and for other children through their many charities and churches and they do not feel offended if a child is born is on Public Aid, as long as that child's money that's given to them as a dependent child under Public Aid is properly used. They object when the money is improperly used and improperly spent. And to me, to look back to my childhood, after reading a speech by Ernst Bender, the President of the West German Supreme Court, a country in the thirties and the forties, who suppressed the rights of everybody, not just the unborn, but also the born. I hear the cries from Dachau, I hear the cries from all the concentration camps, I hear the cries of many of the babies that were killed through

the years and we still hear those cries. And, they cry, where's my mother, I want to live and enjoy life. My people came here from East Europe for one reason and that was to have a right to live, a right to be . . . be alive and a right for those people to be alive. When they went to war in World War I and World War II, they fought many times their own relatives for this basic right of freedom and life for all and it's only enough for us to ask, even if it only includes a little bit, to say let's give life to those children that want to be born. This is what we want to do. These children have no voices here. We treat them like baggage and garbage. And they talk about that it is going to lead to back alley abortions. Well, I want to tell you, these clinics that perform these Public Aid abortions, the majority of them are butcher shops. There's no way the Board of Health in the City of Chicago can go in even to make a cleanliness inspection, they're prohibited from doing this. They're resorting to back alley abortions. And, when you look at what's being done by the Department of Public Aid and they're allowing for abortions in the second trimester, this is where life is involved, the second trimester we're also talking about. What's going on? My people don't want abortions being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly as long as it's properly used. But, if it's for something that they believe is not properly used, and it's going to terminate the life of some person, they are not for it. . .

PRESIDING OFFICER: (SENATOR DONNEWALD)

Senator. . .

SENATOR LEMKE: . . . they did not fight and die in foreign countries, but they fought for the freedom of all people because this is our country. . .

PRESIDING OFFICER: (SENATOR DONNEWALD)

. . . Senator. . .

SENATOR LEMKE: America should lead the way. We shouldn't let West Germany lead us, we should show them that we are the land of the free. I ask for a favorable adoption.

PRESIDING OFFICER: (SENATOR DONNEWALD)
Just . . . the question is shall House Bill 333 pass. Those in favor vote Aye. Those opposed Nay. The voting is open. Have all those voted who wish? Take the record. On that question the Ayes are 41, the Nays are 11, 3 Voting Present. House Bill 333 having received a constitutional majority is declared passed. The members of the gallery will please refrain from demonstrations. House Bill 1650, Senator Netsch. Read the bill, Mr. Secretary.

**Illinois House of Representatives, Transcript of Debate
on House Bill 333 (November 3, 1977)**

SPEAKER MADIGAN: "Mr. Brummer to explain his vote. Have all voted who wished? The Clerk shall take the record. On this question there are 117 'aye', 44 'nos', no voting 'present'; and the motion having received a Constitutional three-fifths Majority prevails and House Bill 312 is declared passed notwithstanding the veto of the Governor. On the Order of Total Veto Motions there appears House Bill 333. The Chair recognizes Mr. Leinenweber."

LEINENWEBER: "Thank you, Mr. Speaker. I think most of you know the contents of House Bill 333. What it seeks to do is establish the public policy of this state in regard to the expenditure of Medicaid Funds, and that is, to prohibit the state from spending Medicaid Funds for abortions unless the life of the mother is in danger. The issue is, in my opinion, is not whether or not we have abortions or not have abortions. That case, unfortunately, was decided by the United States Supreme Court. The issue is, what should the public policy be in this state in regard to the expenditure of taxpayer's funds. Now this issue was litigated all the way to the United States Supreme Court last spring and resulted in the case of *Maher versus Roe*.

The United States Supreme Court stated . . . very clear terms that it is up to the individual State Legislators to determine how Medicaid Funds, how public funds could be spent for medical services for terminations of pregnancy. In other words, the state can use the funds or it can choose not to use funds. It is my position, and I believe the position of all those . . . most . . . vast majority of those people in this state who care—unfortunately there are a lot of people who don't care—but of those people who do care, it is my strong feeling that the vast majority of them favor House Bill 333 and we should make a public policy determination that taxpayers' funds, those funds extracted from our taxpayers in this state, should not be spent for abortions unless necessary to preserve the life of the mother. Now, what reasons should guide this state in determining the public policy? First and foremost, I would suggest to you that millions of people in this state and elsewhere strongly feel that nontherapeutic, nonmedically necessary abortions are immoral and wrong. And I think it is the providence of the state that they take into sound consideration the feelings of those taxpayers whose tax money we vote to spend. Now over and above the overriding consideration of what the taxpayers feel in regard to the expenditure of their funds, I would suggest there are other compelling reasons for the State of Illinois to do what in the terms of *Maier* versus *Roe* the Supreme Court said we could do, and that is, by legislation to prefer childbirth over abortions. I would suggest to you that . . . you talk to people who want to adopt children, and there are thousands of people in this state who this day are waiting to find a child that they can adopt—who for one reason or another cannot have children of their own—thousands of people are forced to go to the black market and pay . . . literally thousands of dollars in attempts to obtain a child that they can raise. I would suggest to you that the overriding reason why there are no children available in the State of Illinois and elsewhere is the policy of this state currently to spend taxpayers' money to abort the unborn. Another compelling reason for the state, I think we should look to the fact that we are now in the State of Illinois

and elsewhere, at below zero population growth. I would suggest to you that it is a very sound fiscal reason for the state not to encourage the destruction of its unborn, and that is, to consider the fact that when those of us reach retirement age, that we do have some children left to supply the money to pay for our retirement and to take care of us. Very briefly, I don't want to dwell on the issues raised in the Governor's Veto Message. All of those issues were argued extensively in Committee and on the floor of this House last spring when we overwhelmingly adopted House Bill 333. There was nothing new raised by the Governor, they've all been considered before. The Equal Protection Clause of the Constitution is not violated by House Bill 333. The United States Supreme Court has made that very clear. As far as the back alley butchers, I would suggest to you, you go back and read some of the articles in the Chicago press about the so-called abortion clinics in that city which literally hundreds of people per day go through there obtaining quickie abortions. I suggest to you that you read those exposés and determine for yourself whether or not those people who currently stand in line to obtain abortions are receiving proper medical care. I would suggest to you that with the present cost of abortions in these clinics that we aren't causing any particular hardship that would . . . would resurrect the back alley abortionists. Again, are we being fair to the poor? Well, for . . . first of all, there's no equal protection problem because the state would not provide anybody with a free abortion unless it's medically necessary. What about reverence for life . . . to have these hundreds of people go through during their lunch hours to obtain abortions? What about the counseling these people receive? What kind of counseling do you receive when you run through a hundred people a day? I would suggest to you that the emotional scars that these procedures leave on these people is a good reason not to be so fast and ready with the state's money to provide them with these free abortions. What about rape and incest? First of all, it should be enough to say that they are virtually unheard of. And I would just point out that the Bill does not prohibit an

abortion. All the Bill addresses is the question of the expenditure of taxpayers' money. And I might say that to suggest to you that the scars of a rape or an incest are not going to be eradicated by an abortion. And I would suggest further that it's quite possible additional scars will be heaped upon those already there. Finally, I'd like just to point out that the unborn is a separate, distinct human life. And this is not a theological argument, this is a biological and genetic fact. The unborn is not potential life but is human life with potential. And I'd like to share with you the words taken from the yearbook of Obstetrics and Gynecology in the year 1940, and I think they're very apropos. 'At the present time when rivers of blood and tears of innocent men, women and children are flowing in many parts of the world, it seems almost silly to be contending over the right to life of an unknown atom of human flesh in the uterus of a woman. No, it is not silly. On the contrary, it is of transcendental importance that there be in this chaotic world one high spot, however small, which is safe against the deluge of immorality and savagery that is sweeping over us that we, the medical profession, hold to the principle of the sacredness of human life and of the rights of the individual, even though unborn, is proof that humanity is not lost'. In closing, Mr. Speaker, Members of the House, I would suggest that the public policy of this state ought to be that embodied in House Bill 333. I therefore, Mr. Speaker, move that House Bill 333 do pass, the veto of the Governor notwithstanding."

SPEAKER MADIGAN: "Mr. Kelly."

KELLY: "Thank you. Mr. Speaker, Members of the House, I rise to support Representative Leinenweber in House Bill 333. In my opinion, this is the most important subject which will come before this Body during the Fall Session, and that is to protect the lives of not only thousands but in reality, millions, of unborn children who will be aborted by use of Public Aid Funds. Now I resent my tax dollars being used to

finance abortions and I know that many of my constituents join me in this particular view. It seems to me that the taxpayers should have something to say about how their tax dollars are being spent. House Bill 333 is consistent with the efforts which are being made in Washington. And it's also consistent as Representative Leinenweber pointed out with the recent decision of the U.S. Supreme Court which proclaimed that states can make this determination. You know, Ladies and Gentlemen, life is a precious thing and we have a responsibility not only to our forefathers but to mankind to maintain and defend the rights of the unborn. I gladly rise in support of Representative Leinenweber's motion."

SPEAKER MADIGAN: "Mr. Gaines."

GAINES: "Mr. Speaker and Ladies and Gentlemen of the House, it intrigues me that the persons who are hollering the loudest to deny the rights of a legal abortion to poor people don't have poor people in their districts. It also amuses me, and also disdains me, that they're mostly the same ones who vote not to give these children subsistence in terms of public aid once they get here. They say, 'Bring them in then starve them to death. Bring them in then don't give them adequate health care so they catch something else and die'. These are not the people who want more medical care for babies of a public aid recipient. And I'm quite sure that if some grotesque imbecile impregnated their daughter or wife they'd find an abortion center. I'm quite sure that the rights that they want to deny persons because they are on public aid are rights that most of the people in their districts cherish even though they may be secretly rather than publicly. I do not feel that persons because they're on public aid should be denied a legal right. They talk about the court decision. The court decision says it's just as legal not to have this restriction. It does not say you have to have this restriction. And the whole country agonized on this issue . . . and taxpayers on both sides. So no matter what you do, some taxpayer is going to have his money spent or not spent as he or she does or does not see fit. I don't hear these people getting up defending the rights of the poor to have other things

other than babies. Then the same ones will get up later when we have the Pubic Aid Budget and swear up and down that they have babies just because they want to raise their level of subsistence. You can't have it both ways. So therefore, I'm urging you to support the courageous stand of our Governor. Thank you."

SPEAKER MADIGAN: "Mr. Mugalian."

MUGALIAN: "Thank you, Mr. Speaker. I think that the aim of the law should be to reduce the degree to which governments treat their citizens differently. For example, the criminal justice system is, or should be, judged on whether all defendants receive a fair trial regardless of their station in life and regardless of their financial resources. This concept pervades our Anglo-American jurisprudence and has been incorporated into our State and Federal Constitutions . . . equal protection under law. No person may be deprived of life, liberty or property without due process of law. Which means that all persons are entitled to due process. The perfect law, Ladies and Gentlemen, and perfect laws would not permit a small differential in treatment. It would permit no differential. Equality of opportunity, equal access to the marketplace, equal guarantee of civil liberties, equal educational opportunities, equitable criminal sentencing, that's what it is all about. This is an ideal toward which we must strive although we may never obtain it. It has an ancient honorable origin from Aristotle who spoke of distributive justice. Who St. Thomas Aquinas, the Magna Carta, our Declaration of Independence and the U.S. Supreme Court decision, in Brown against Board of Education. House Bill 333 does violence to that concept. It is a step backward. In the Governor's words, 'It is also cruel'. House Bill 333 is essentially a selfish assertion of private, personal, judgmental morality. It says, 'You shall not use my tax monies for what I consider personally objectionable'. Not only is this sentiment selfish, it is grounded on money selfishness. Or at least it is only operative against the poor. HB 333 asserts . . . it asserts, 'I don't care that this strikes the poor, the frightened,

the weak. Thou shall, if thou are on welfare, bring the result of violent rape or incest to full term. I can't impose my standards on the well to do but I can impose them on you and I will'. That's what that Bill asserts. Now it may be argued by proponents of this Bill that it only goes part way in preventing abortions but that that is not the fault of the Sponsors. It is a step in the right direction they will urge. I suggest that this step . . . step makes the situation far worse. That it creates a form of apartheid. That it walls off the poor. The anti-abortionists would probably settle for a law that would prohibit all abortions except those to save the mothers' life and except in cases of rape or incest. Not all of them would, of course, but that would probably represent to them an acceptable compromise. Surely they would extend these three exceptions to welfare women. But HB 333 says to the poor, 'You and only you, cannot terminate a pregnancy resulting from rape or incest. The U.S. Constitution may protect only the well to do'. The Governor says that quote, 'He can understand the intent of the Sponsors and Members of the General Assembly but that they did not, 'intend the cruel result'. I suggest that the Governor is placing tax above candor. But be that as it may, there can not now be any misunderstanding as to the invidious discriminatory effect of this legislation. Therefore, Mr. Speaker, the effect and the intent are now unmistakable. I urge you all to sustain the veto."

SPEAKER MADIGAN: "Mr. Ewell . . . excuse me, Mr. Mann was up prior to Mr. Ewell. Mr. Mann."

MANN: "Thank you, Mr. Speaker. I don't think anyone in this House has more respect for the Sponsor of this Resolution than I do. I think that Representative Leinenweber speaks with great sincerity on all issues, including this one. And I must also bare my soul to the extent that I am troubled by what would seem to be a contradiction between my concern for life, as evident by my Sponsorship of Capital Punishment Abolition Legislation and then my position on this legislation. I don't feel qualified to get into a metaphysical or medical colloquy on

whether or not life starts at a different time or period during pregnancy. But it does seem to me that we are now witnessing one more example where government is coming down on the poor. There are close to two-hundred-thousand women living below the poverty line in the State of Illinois, who have to raise babies on thirty-four cents a meal in this day and age. And where, despite our pleading and begging, we can't get even a five percent cost of living increase. Even though the cost of living has gone up seventeen percent since the last cost of living raise was granted. Secondly, we can't even get prenatal care for these two-hundred-thousand women because the double standard of color and poverty prevails in our entire health care system. Third, here we sit over one-hundred and fifty men voting on the lives and the bodies of women. And I just wonder if that is an appropriate thing to do. I think that a woman should have some control over her own destiny, over her own life and over her own body. Finally, I would say this to you, in the State of Illinois where you have about a million and a half people living below the poverty line, the poverty line not set by Russia or some other country but set by the United States of America, people who are denied equal justice before the law in our courts, equal health care in our hospitals; for how long do you think these people are going to take government tyranny and government abuse when it comes to them? I would suggest to you that when you cast this vote, you search your minds and your hearts. You recall, if you will, the double standards that permeate our society throughout. You know and I know that a wealthy affluent woman in Chicago and in the State of Illinois can get an abortion any time she wants to, anywhere because she has the means to do so. You don't say that you're going to deny her deductions on her income tax. You don't say that you're going to discriminate against her in terms of access to private medical care. But what I'm saying is . . . I'm about to conclude, Mr. Conti, I'm about to conclude."

SPEAKER MADIGAN: "Mr. Conti."

CONTI: "Mr. Speaker and Ladies and Gentlemen of the House, point of order. We've got an awful lot of Bills to discuss and Bradley . . . the Chairman up there before suggested that

we speak not on the merits of the Bill. This Bill was discussed in full length. What we should be doing here is deciding to override the Governor's veto or not. The last three Gentlemen who talked spoke on the merits of the Bill. And I think that we're going to be here until 3:00 in the morning if we discuss the merits of each and every Bill. The issue here is to override the Governor's veto or not to override it."

MANN: "Well, to the distinguished Gentlemen and my friend, Mr. Conti, I've been here 15 years and I thought Members had a right to speak on issues. And I'll never cut you off, Sir. And it's not an Amendatory Veto, it's a total override. I'll conclude by saying that I hope you weigh this issue and your conscience and then vote."

SPEAKER MADIGAN: "Mrs. Dyer."

DYER: "Very briefly, Mr. Speaker and Ladies and Gentlemen of the House, certainly no one has more respect for the Sponsor than I. We agree on many other important issues. So when I make my three quick points I hope he'll remember I'm speaking about the Bill and not the Sponsor. There are three reasons why this is a very harmful Bill and why the Governor's veto should be sustained. First, as a woman, as a mother and as a grandmother who has just welcomed a new grandchild with great joy, this summer, I'd like to point out to the Sponsor that the normal, natural thing is for a baby to be wanted and to be welcomed and to be provided for. That is the natural pattern of humanity. When any woman is desperate enough to even think of abortion she's already gone through a traumatic stage. This Bill does not permit her even to abort a fetus even in cases of rape, incest or in a prediction of fetal deformity. So even if there are predictions that the child is going to be mongoloid, under this Bill the poor women in this state will go on and have to bear this type of child. I think that's a very unfortunate aspect. Second, I think everyone in this room should be mindful of the fact that the health insurance plan paid for by taxpayers, available to the General

Assembly, whose salary is paid for by the taxpayers, does include coverage for abortions. So, I think that the Bill is hypocritical in that sense. Thirdly, I think we should remember the historic separation of church and state in this country. The Supreme Court has very wisely said that every woman in the first trimester has the right of individual conscience to decide with her physician whether or not she wants an abortion. We're taking away this right now from poor women. And I'd like to warn every Member of this General Assembly to think how they would feel if one day a member of Jehovah's Witnesses happens to be a Representative here and wins enough clout and enough influence to pass a Bill saying there should be no more blood transfusions. Or if a Member of the Christian Science Church gains enough power to say that we can't have any medical insurance of any kind because we believe in spiritual healing. I think we have to keep church and state separate. I think that the Governor's veto should be sustained."

SPEAKER MADIGAN: "Mr. Ewell."

EWELL: "Mr. Speaker, Ladies and Gentlemen, I sit here and listen to the voice of the righteous who will now impose for all people, their will. They say that they are sensitive men. And that they have feelings and they understand. They are so sensitive that they will tell us they can even hear the unborn cry. But yet, these same Gentlemen do not see these children when they come here and live in misery, squalor and poverty. They say we can not see them, for they are costly. They say they hear the unborn, but they have no feeling for the uneducated and the unemployed. When the time comes to pay the bill for the education because these children are unfortunate, they say 'No, no. We believe only in a system where everybody pays their own cost.' These Gentlemen, sensitive as they are, refuse to even speak for the weak and the unfortunate and those who have no voice. But even beyond that, they refuse to even read the Veto Message of their own Governor. For there the entire thing is laid out, what the Bill does and what the Bill does not

do. And I certainly do not have to read this Bill for you or the message for you. But I would like to quote the Governor's final line, in which he says, 'In the end a man can act only out of sense of duty and conscience. The Constitution of Illinois confers that duty upon the Governor and my conscience has told me how to answer it, whatever the political cost.' That, Ladies and Gentlemen, is a statement of political courage. I too will join the Governor because he is right. And I suggest to the Members of the other side of the aisle, it's very easy to run when you think you can help yourself and your district pick up a vote or two here. But remember, you keep chopping, whittling down your Governor, you're going to have nothing left to hide behind and the people will soon see you. The Governor is correct in the message, he's entirely right and I will answer my conscience and I will support him in his Veto Message. Thank you."

SPEAKER MADIGAN: "Mr. Telcser."

TELCSER: "Mr. Speaker and Members of the House, I rarely, if ever, get up to speak on a subject such as this. In the past I've cast my vote and that was it and I really had intended to do that today only. But a prior speaker, the Lady from DuPage, I think really very succinctly hit the nail on the head when she alluded to the fact that the court, based upon their decisions I think, would clearly rule this piece of legislation, should it become law, unconstitutional. The fact that it eliminates situations such as rape and incest clearly makes this piece of legislation, in my opinion, so restrictive and so narrow that it is unlikely that any court would uphold the constitutionality of this piece of legislation. That, I think, is a very important point. It's a point which I think that every Member ought to consider, regardless of how they believe the other facts fall upon this question. I believe that the Governor did do a courageous thing when he vetoed this piece of legislation. As the prior speaker, I think that he ought to be sustained, I hope he's sustained and I urge every Member to vote to sustain the Governor's Veto on this particular Bill."

SPEAKER MADIGAN: "Mr. Davis."

DAVIS: "Mr. Speaker and Ladies and Gentlemen of the House, I rise to support the convictions of the Governor of the State of Illinois on House Bill 333. And I also want to say, in his Veto Message, he has made the most profound statement any Governor has ever made in his veto. Surely, this statement will be included among the great statements that men of past ages have made. And I will quote, 'I hereby return House Bill 333, withholding my approval and ask you to prayerfully and carefully consider the human consequences involved. If you reaffirm initial decisions . . . your initial decision that this Bill shall be law, prayerfully consider.' That is the most profound statement because that's exactly what I've done. A lot of people were down here, I guess two weeks ago and they came to me, some of them from the various churches on the south side, some of them even from my church and said, 'We came down here. We're going to stop this abortion. We're opposed to them and we're going to stop them.' And I said to them, 'That's your right. But you're not going to stop abortion because the Supreme Court has pointed out the Constitutional Rights of women to have abortions.' I said, 'What you're going to do is stop poor women from using Public Aid money for abortions. That's all you're going to do. Instead of coming down here picketting us in the General Assembly, you ought to be in Washington picketting the Supreme Court because they're the ones who rendered the decision, not us. We simply are lawmakers and they are the highest law interpreting body in the world . . . in our country rather. And that they have said that it's the woman's Constitutional Right. Now everybody's talking about, the Supreme Court is talking about . . . saying about the state doesn't have to appropriate money. Well, I want you to know that with some dissenting justices in that decision, Justice Brennan, Justice Marshall and Justice Blackmun, this is what they said. 'If a state must pay the cost of a live child's bread, as a necessity, medical expenses, it must also pay the costs of elective abortion. For the procedure in each case constitutes necessary medical treatment for the condition of

pregnancy. Therefore, the state cannot contend that it protects its fiscal interests in not funding elective abortions when it would cause far greater expense in paying for more costly medical services performed in carrying pregnancies to term. And after birth, paying the increased welfare bill incurred to support the mother and the child.' Now, I respect every man's religious convictions and every woman's religious convictions. Back in the 20's I was a Scout Master and I heard a beautiful speech on the floor by one of the young men who was in my troop in those days. I went down in West Virginia, when a man I regard as a great liberal was running in the Democratic Primary to oppose John Fitzgerald Kennedy. And I spoke with a lot of feeling down there and a lot of people came to me and said, 'What's wrong with you? Are you really against Mr. Humphrey?' And I said, 'No, I'm not against Mr. Humphrey, I'm for Mr. Kennedy. And I'm going to tell you why I'm for Mr. Kennedy. We've got an opportunity here to kill two birds with one stone. One is the old bird known as 'religious prejudice' and the other one known as 'racial prejudice'. And I'm down here to take a shot at him.' And we took a shot at him and the results are that Kennedy finally went on and was elected as President of the United States. The first Roman Catholic ever to be elected. And my heart was proud. And certainly of his performance, there's no question about what he started the ball 'a rolling in this nation that resulted in the things we enjoy. I was absolutely right. I know I was right and I respect your religious convictions but let me tell you this; when someone comes to me, as a preacher, talks to me about an abortion and wants my advice, do you know what I'd tell him, confidentially? It's better to have that child on your knee than to live forever with that child on your conscience. That's the way I feel about it, personally. But this Bill is simply a Bill robbing women of their Constitutional Rights simply because they're poor and I think we ought to rise, irrespective of any political consequence, we ought to rise to the dignity of the occasion and support the Governor who has made, I believe, one of the most important statements that has ever been made

by any Governor. And he said that he made it prayerfully and I think that that's a great statement and I plead with you now. Forget about the political consequences and uphold this man when he's right."

SPEAKER MADIGAN: "Mr. Kosinski."

KOSINSKI: "Mr. Speaker, I feel that minds are well made up, no additional rhetoric will change any votes and in the interest of time, I respectfully move the previous question."

SPEAKER MADIGAN: "The Gentleman moves for the previous question. All those in favor signify by saying 'aye', all those opposed by saying 'no'. In the opinion of the Chair, the 'ayes' have it and the motion carries. Mr. Bradley, to close the debate."

BRADLEY: "Well, Mr. Speaker and Ladies and Gentlemen of the House, I would like to respond to some of the Members who I'm sure very sincerely opposed this legislation. It's a relatively simple Bill, as Representative Leinenweber has explained. It does not prohibit anybody having an abortion. It prohibits the people who are on welfare from having an abortion. One Member of the Assembly suggested that we who sponsored this legislation for a number of years were not responsive to those who are not as fortunate as maybe we are. I would suggest to those Members that they look at the voting record of all of us concerning the Education Bill. Title One . . . The Title One money that we send to those people who are in dire need insofar as education, whether it be in the East St. Louis area where we contribute over \$11,050 per student in that particular school system and I supported that legislation and I support Title One. I know some school children are receiving a flat grant. There's no question about the need. I believe the budget in the State of Illinois, almost one-third of it, which I support, Representative Leinenweber supports and other Members support. Over one-third of our funds go to the needy. Mr. . . . One Member of the Assembly has some question about the . . . his position regarding the Death Penalty and the Bill we are

facing here today. Let me quote to you from the *Chicago Sun Times* on Wednesday, November 2nd. 'A Federal Family Planning Expert said Monday that the vacuum method of abortion also should be used much later in pregnancies than is now customary because it is cheaper, safer, psychologically less wearing on the women than other methods.' They go on to say, 'For abortions later than the 12th week the standard procedure involves inducing labor in the woman to expel the fetus.' And this is the . . . I would like to underline this next, the last part of that sentence, 'inducing labor on the woman to expel the fetus which is killed earlier by a salt solution.' It's also . . . the Governor's message has been quoted rather extensively. I'd like to quote from the message also, because I did read it. And in the third from the last paragraph he says, 'I understand that in vetoing this Bill I depart from the position expressed by the President of the United States, the Congress of the United States, the Department of Health, Education and Welfare and the General Assembly of the State of Illinois. I also believe, in so acting, I am going against the sentiments of the majority of the people of Illinois.' I read the message on more than one occasion. And those words struck home to me more than anything else. The majority . . . the majority of the people of the State of Illinois, regarding the question of the Constitutionality, I think that question has been resolved by the Supreme Court of this nation. So, I would simply urge that those people who voted for this Bill when it came through this House some time last spring vote again to pass this Bill, notwithstanding the veto of the Governor. Thank you."

SPEAKER MADIGAN: "The question is, shall House Bill 333 pass, notwithstanding the veto of the Governor? All in favor signify by voting 'aye', all those opposed by voting 'no'. Mrs. Willer, to explain her vote."

WILLER: "Yes, Mr. Speaker, I voted 'present' on this last spring because I believe the Bill was unconstitutional. The courts have declared it is not unconstitutional, we may pass this legislation. I'm voting to support the Sponsor to override the veto of the Governor because I truly believe that the 'embryonic child' as President Carter phrased it, is a human being with the same values I have. I do not cast my vote because of religious convictions. I quarrel with the Catholic Church on most other issues, quite frankly, involving sexuality. I am not casting my vote on the basis of what's popular in my district. I just took a poll, over fifty percent of the people in my district favor the Supreme Court Decision. I have reason to believe they will not like me for this vote. Certainly, the people who supported and helped me get elected are horrified at my vote. They have called me constantly about it. This is a vote of my conviction that the fetus is a human being. This is saying I believe therefore it has the same worth I have. I am appalled and I would just say I hope the Sponsor doesn't really feel that . . . I hope he doesn't try to perpetrate upon the people of Illinois the idea that the children born, because of this action we are taking, will be wanted, will be adopted. Let's not kid ourselves. This is a cruel Bill. I know it is and we should admit it but it is not as cruel as destroying the fetus and that is why I'm casting my vote."

SPEAKER MADIGAN: "Mr. Johnson, to explain his vote."

JOHNSON: "Through all the discussion by the opponents of this Bill, the one thread that weaves through their comments is concern for the underprivileged or the poor. I share that concern but they all ignore and all the discussion has ignored one group of the poor who are not afforded protection but through the passage of this Bill and that's the unborn poor. The unchild . . . or unborn who might grow up to be a physicist or an author or if he's really unlucky, a Legislator or something that's going to be productive for society. I think we're making a

value judgment that somehow the unborn poor have less a right to protection and less a right to life than other people do. And I think that that's a protection that society ought to afford everyone, the right to life. And that's more important in my judgment than any other single right we have."

SPEAKER MADIGAN: "Mr. Deuster, to explain his vote."

DEUSTER: "Very briefly, Ladies and Gentlemen of the House, the question is not here anything to do with individual rights. This legislation does not grant, expand or limit or take away anybody's individual rights. What this legislation does is simply establish the public policy that the people expect to establish in the State of Illinois with respect to the attitude toward life and toward the attitude of what some of us don't like to refer to but what it really is is the killing of unborn children. We are not taking away the Constitutional Rights that have been recognized by the Supreme Court. An individual person anywhere in the State of Illinois can choose to terminate a pregnancy or have that child in the womb killed. What we are doing is saying, 'We're not going to promote it, we're not going to subsidize it, we're not going to reach into the pockets of the taxpayers of Illinois and force them to pay for something that they think is wrong and they think that's something that should be discouraged as a matter of public policy.' The rights remain, what we're doing here is not subsidizing and promoting that practice."

SPEAKER MADIGAN: "Have all voted who wished? Have all voted who wished? The Clerk shall take the record. On this question there are 126 'aye', 42 'no', no voting 'present'. The motion, having received a Constitutional three-fifths majority prevails and House Bill 333 is declared passed. Notwithstanding the veto of the Governor."

**Illinois Senate, Transcript of Debate
on House Bill 333 (November 17, 1978)**

SECRETARY: I move that House Bill 333 Do Pass the Veto of the Governor to the contrary notwithstanding. Signed, Senator Lemke.

PRESIDING OFFICER: (SENATOR ROCK) Senator Lemke.

SENATOR LEMKE: I move to override the Veto . . . the Veto of the Governor on . . . on House Bill 333, which is the funding of abortions by the State of Illinois if we fail to pass this bill. This bill will prohibit it and I ask for a favorable vote.

PRESIDING OFFICER: (SENATOR ROCK) Is there any discussion? Senator Smith.

SENATOR SMITH: On one or two previous occasions here in this Body, I have talked one way and voted another with regards to one or two measures during my long term of attempted service here in the Illinois State General Assembly. With regards to this bill, I'm going to vote contrary to my intellect. I remember not long since when the former President of this Body came to me and asked of me that I support a bill that some of us have been under the impression would come before us anew in this Session. I spoke against that bill or resolution as it was and to satisfy him I voted for it. I have been asked to vote a given way with regards to this particular measure and I have been informed by letters since I arrived here this week by the same groups that came to me to support a particular position with regards to my vote on this particular matter that the good Senator has now seen fit to bring forward. I didn't understand the reasoning of those who came to me. They're from my district and I had thought that perhaps their views concerning this measure were the same as mine, but it so happened and developed that it's contrary to all that's a part of me. They ask of me to vote Aye on this measure. I'm going to do that. Not that it is my reasoning nor is it my belief that the

Senator's motion will prevail, but to satisfy those who have voted for me consistently, a goodly number of years, I reflect not my own view, I reflect their view by my vote. Yes, as I will when we reach that period.

PRESIDING OFFICER: (SENATOR ROCK) Senator Wooten.

SENATOR WOOTEN: Thank you, Mr. President and colleagues. I am one of the few people in this Chamber who will vote to sustain the Governor's Veto on this measure. And I do so in spite of the fact that I am opposed to abortion, principally on biological rather than religious grounds. I think there simply is no argument that life is a continuum from conception to death. But unfortunately, this really doesn't address that problem. And I think we are most responsible as Legislators when we think clearly into an issue before us. Please remember what this bill does not do. It does not outlaw abortions, it does not prevent abortions, it does not limit the number of abortions. All it does is deny money to people on welfare who elect to have an abortion. To me there is something faintly obscene about that. I believe that in this bill we are venting our anger and frustration at not being able to outlaw abortions because of the Supreme Court decision. We're also venting anger and frustration that many people feel against anyone on welfare. So we're letting an emotion guide our vote on this and a feeling which will circulate through the State that somehow we have actually done something to halt abortions. It does not do that at all. It simply says that women who choose to have abortions will continue to have them, but the poor must really bear a burden. A financial burden if they choose to have them. Wealthy, okay. Middle class, no problem. The poor we're going to make it tough for you. I don't think that's a moral vote. And because of that I simply have to sustain the Governor's veto of this bill. I think the one really correct thing he's done since he's been in office.

PRESIDING OFFICER: (SENATOR ROCK) Senator Rhoads.

SENATOR RHOADS: Thank you, Mr. President and members. I had not intended to speak, but since Senator Wooten has raised a couple of issues I . . . I think it's important to make a couple of observations. Number one. It's the easiest thing in the world to impune the motives of those who disagree with you. I think the rule in this Chamber ought to be that the motives of those who . . . with whom we disagree are, at least, as honorable as our own. Number two. Those who disagree with the Roe versus Wade decision do so because they view this as an act of homicide and because they view the public subsidy as paying for that act of homicide. It is not a move to punish poor people and it is unfair to suggest that it is.

PRESIDING OFFICER: (SENATOR ROCK) Is there any further discussion? Senator Wooten, for what purpose do you . . .

SENATOR WOOTEN: In response to Senator Rhoads, I think I must draw an even finer distinction. Maybe I should say I believe there's a self deception involved here. I believe that Senator Lemke's motives are absolutely strong and straight forward, as are the motives of most everyone who votes on one side of the issue of this or the other. I simply believe we're deceiving ourselves and I believe that in permitting that to happen I find something very uncomfortable in that. I believe it is a self deception.

RESIDENT: Senator Rock.

SENATOR ROCK: Thank you, Mr. President and Ladies and Gentlemen of the Senate. I rise in support of the motion to override the veto on House Bill 333. I have had some correspondence with the Director of the Department of Public Aid and while I will agree with the speakers, as we discussed when the bill was up for passage last Session, this is not the outlawing of abortion, it is an expression by this Assembly, a

matter of public policy that we, the people of Illinois will not subsidize abortion. Twenty-four thousand eight hundred and eleven abortions were performed with public monies last year. Three point three million dollars. I happen to agree with Senator Rhoads. It's homicide and for us to subsidize it, it's just plain wrong.

PRESIDENT: Senator Glass.

SENATOR GLASS: Thank you, Mr. President and Ladies and Gentlemen. I rise in opposition to the motion and in support of the Governor's Veto, which I think, was an extremely courageous act and would point out to the Body that although you can say that it doesn't deny abortion to anyone, in fact, that is not true. Anyone who cannot afford abortions and is on Public Aid will be denied an abortion and . . . and may very well choose an abortion from an illegal source, which may end up in far more serious consequences and may land such people back in . . . in hospitals. I'd also point out that victims of rape or incest will not have the opportunity to choose whether or not they should terminate pregnancies under this legislation or where there is likelihood of a fetal deformity or . . . or serious threat to their physical or . . . psychiatric health. And I think, probably, the best statement we can make in support of this veto by the Governor is his own statement in the Veto Message, which, if you haven't read, I certainly commend it to all of you. He says, at heart though, this bill simply denies a constitutional right to some women because they are poor. My belief is, that such women will, in many cases, attempt to terminate unwanted pregnancies and other more desperate ways. Those ways may lead to needless death and suffering of mothers and children. I agree that life is often unfair and that it is not within the power or duty of government to rectify all perceived wrongs or to satisfy all expectations. But this bill is more than unfair. It is cruel. I cannot, in conscience, put my name on such bill. That is right on point, Ladies and Gentlemen, and I would urge a No vote on this motion.

PRESIDENT: Senator Knuppel.

SENATOR KNUPPEL: Well, it's silly to argue that somebody on Public Aid ought to have a Cadillac because if they don't get one they'll go out and steal a car. That's just how consistent . . . inconsistent the arguments are. And I'll say this, most of the members on this Floor that vote for this bill . . . or vote for the Governor's Veto and against an override are the same people who vote against capital punishment. Now I tell you, when a person is born and lives in this world and has a chance to know what the laws are and you tell me that person ought not to be put to death under capital punishment, but yet you admit that conception is the start of life and that you should be able to take that life before birth, when that child hasn't had a . . . chance for redemption, it reminds me of an article I got through the mail the other day and it read something like this, you know, vote for this bill or vote for the Governor's to sustain the Governor's Veto because if you don't there'll be a lot of unwanted children and if they're unwanted children, there'll be a lot of child abuse and, you know, kill them before they're born so there won't be child abuse. It . . . the . . . the logic of these arguments that a person will go out and get a cheap abortion if . . . if we don't provide one with tax money. Now you see that tax money, part of it's mine. Now I don't believe in whiskey either and you'll never see me buy a drink for any of you guys. I don't want to pay for somebody's abortion either.

PRESIDENT: Is there any further discussion? If not, Senator Lemke may close the debate.

SENATOR LEMKE: Mr. President, members of the Senate. The issue is back to us. It's a sorry day in Illinois when we have to have an issue come back for an override while we're trying to protect somebody's life on a bill. We heard the reasonings why that the poor should have abortion, because they're going to bring up children that might not be able to cope with life, financially, and they should have this choice. Or they're going to go to the back butcher shops in . . . in the

alleys. Well, I'm telling you, they go to the butcher shops now. Two butcher shops were closed down in Chicago for legal abortions, legal abortions. And there's more going on because the Board of Health cannot go into these clinics and we look at the newspapers, which is a sorry sight. They play in their advertisement on little girls who become pregnant or girls that are lost in the big city who become pregnant. They don't tell them the consequences at these clinics, because these clinics are set up to do one thing and that's to make money. They don't tell them that maybe you shouldn't have an abortion. They don't tell you about the problems you're going to have later in life mentally because you had an abortion. And the people that end up in mental institutions or end up with a mental disturbance because they feel that they killed their child and they can't have any more. And we hear this about poor children not having everything in life. Well some of the greatest people in this society that come in history came from poor families and they raised themselves and they pulled themselves up and worked and some of these children, Gentlemen, were children that were born in incest. Like . . . and some of them were born in legal incest, like Toulouse-Lautrec, one of the greatest painters. Legal incest, because we passed the Statute. Who are we to judge whether someone should live and die when we had nothing in the make in . . . in his creation. We have not that right. But take one step further, Gentlemen and let's look back not too far ago and let's look at World War II and let them choose in Nazi Germany as to who should live and die, who should go in the ovens, who should be shot, who should have children, who shouldn't have children. Let the government decide, let big brother do the business. That's what we're talking about. We have in this State a chance to do something that's constitutional. And that's where I disagree with the Governor. This a constitutional thing because the Supreme Court has ruled it's constitutional it's within the States prerogative. My taxpayers and I'm sure your taxpayers who feel they are moral people, do not want to have their money used

for something they feel is immoral and that's the killing of a child. So I ask for an override and a favorable vote for this override of the Governor's Veto. Thank you very much. Gentlemen.

PRESIDENT: The question is shall House Bill 333 pass the Veto of the Governor to the contrary notwithstanding. Those in favor will vote Aye. Those opposed will vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Take the record. On that question the Ayes are 40 . . . for what purpose does Senator Washington arise? Senator. the request is out of order at this point until I have announced the . . . the vote and then the verification will be in order. On that question the Ayes are 42, the Nays are 12. 1 Voting Present. And House Bill 333 having received the required three-fifths vote declared passed, the Veto of the Governor to the contrary notwithstanding. Senator Washington has requested a verification of the roll call. The Secretary will please verify the affirmative votes.

SECRETARY: The following voted in the affirmative: Berning. Bloom. Bowers. Bruce. Chew. . . that's wrong. Clewis. Coffey. Daley. Davidson. Demuzio. Donnewald. Egan. Graham. Grotberg. Guidice. Harber Hall. Kenneth Hall. Johns. Joyce. Knuppel. Kosinski. Lane. Lemke. Leonard. McMillan. Maragos. Merlo. Mitchler. Nimrod. Ozinga. Philip. Rhoads. Rock. Rupp. Sangmeister. Savickas. Schaffer. Shapiro. Sommer. Soper. Vadalabene. Walsh. Mr. President.

PRESIDENT: Senator Washington. The roll call has been verified. For what purpose does Senator Vadalabene arise? Senator Vadalabene moves to reconsider. Senator Johns moves to Table that motion. All those in favor signify by saying Aye. Opposed. The Ayes have it. So ordered. Messages from the House.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, M.D., et al., <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	No. 77 C 4522
vs.		
ARTHUR F. QUERN, etc., <div style="text-align: right;"><i>Defendant.</i></div>	}	

**PLAINTIFFS' MOTION FOR LEAVE TO HAVE
JANE DOE JOINED AS A PARTY PLAINTIFF,
FOR LEAVE TO HAVE HER PROCEED UNDER A
PSEUDONYM, AND FOR LEAVE TO FILE A
SUPPLEMENTAL PLEADING**

Plaintiffs move this Court, pursuant to F.R.C.P. 11, 15, 20, and 21, for leave to have Jane Doe joined as a party plaintiff, for leave to have her proceed under a pseudonym, and for leave to file the amended and supplemental pleading attached hereto. In support of this motion, plaintiffs state:

1. Jane Doe is a pseudonym for an indigent pregnant woman receiving Aid to Families with Dependent Children ("AFDC") public assistance, 42 U.S.C. §§ 601 *et seq.* and medical assistance under the "Medicaid" program. 42 U.S.C. § 1396 *et seq.*

2. Jane Doe wishes to have an abortion. She is 38 years old and has had nine previous pregnancies, two of which resulted in miscarriages. She has a history of thrombophlebitis, a medical condition which, in her case, has been associated with varicose veins. In the opinion of her physician there is, if she continues her pregnancy, a significant medical risk (about 30%) of deep vein thrombophlebitis, a medical condition which would impair her circulation and require prolonged hospitalization,

bedrest and surgery. He is also of the opinion that if she continued veins will recur. In her physician's judgment, an abortion is medically necessary for her, though not necessary to preserve her life. See affidavit attached hereto.

3. Because of her indigency, Jane Doe is unable to secure a safe and legal abortion unless such an abortion is funded under an Illinois medical assistance program, including Medicaid.

4. P.A. 80-1091, the legality of which plaintiffs have challenged here, denies reimbursement, *inter alia*, for the medically necessary abortion Jane Doe requires.

5. Defendant is now enforcing or will, imminently enforce, P.A. 80-1091 to deny funding for the medically necessary abortion Jane Doe requires. She is therefore unable to secure such an abortion and is therefore suffering, or is imminently threatened with suffering, financial injury and injury to her physical and mental health.

6. For the reasons stated in paragraphs 1-5:

(a) Jane Doe asserts a right to relief against defendant jointly with plaintiffs. This right to relief included declaratory and injunctive relief against enforcement of P.A. 80-1091, in that it violates her rights and the rights of all similarly situated women under the Social Security Act and the Ninth and Fourteenth amendments to the United States Constitution.

(b) This right to relief arises out of the same occurrences as plaintiffs' right to relief, specifically, defendant's actual or threatened enforcement of P.A. 80-1091.

(c) The joinder of Jane Doe as a party plaintiff to this action presents predominant questions of law and fact in common with those presently before the Court.

7. Jane Doe wishes to be a party in this cause; to safeguard her privacy interest in her decision to secure an abortion, she wishes to proceed under the pseudonym "Jane Doe." A woman's right to proceed under a pseudonym in litigation involving her right to an abortion is well-established, and will not

prejudice defendant. *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), *Wynn v. Scott I*, 78 C 237 (N.D. Ill.), *Wynn v. Scott II*, 75 C 3975 (N.D. Ill.)

8. F.R.C.P. 15 requires that leave to file the amended and supplemental pleading attached hereto should be freely given "when justice so requires." Here that standard is plainly met since Jane Doe meets all the requirements for joinder as a party plaintiff, and defendant would in no way be prejudiced by an order granting plaintiffs' motion in its entirety.

Respectfully submitted,

/s/ ROBERT E. LEHRER

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STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

AFFIDAVIT OF DAVID ZBARAZ, M.D.

DAVID ZBARAZ, being duly sworn, states as follows:

1. I am a physician on the staff of Michael Reese Hospital, specializing in obstetrics and gynecology. I have reviewed the medical records of Jane Doe, a patient at Michael Reese who was recently examined by two other physicians on the staff of the hospital. The records disclose the following information:

Jane Doe is 38 years old and has had nine previous pregnancies. She has a history of varicose veins and thrombophlebitis (blood clots) of the left leg. The varicose veins can be, and in her case were, caused by multiple pregnancies: the weight of the uterus on her pelvic veins increased the blood pressure in the veins of her lower extremities; those veins dilated and her circulation was impaired, resulting in thrombophlebitis of her left leg. The varicosities of her lower extremities became so severe that they required partial surgical removal in 1973.

2. Given this medical history, Jane Doe's varicose veins are almost certain to recur if she continues her pregnancy. Such a recurrence would require a second operative procedure for their removal. Given her medical history, there is also about a 30% risk that her thrombophlebitis will recur during the pregnancy in the form of "deep vein" thrombophlebitis (the surface veins of her left leg having previously been partially removed). This condition would impair circulation and might require prolonged hospitalization with bed rest.

3. Considering Jane Doe's medical history of varicose veins and thrombophlebitis, particularly against the background of her age and multiple pregnancies, it is my view that an abortion is medically necessary for her, though not necessary to preserve her life.

/s/ DAVID ZBARAZ

SUBSCRIBED and SWORN to before me this 24th day of April, 1978

/s/ ELMOR B. GREENFIELD

Notary Public

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, M.D., MARTIN MOTTEW, M.D., on their own behalf and on behalf of all others similarly situated; JANE DOE, on behalf of herself and all others similarly situated, and the CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation,

Plaintiffs,

vs.

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid,
Defendant.

No. 77 C 4522

AMENDED AND SUPPLEMENTAL PLEADING

A.

As supplemented by occurrences since the date of the complaint, ¶ 1, 16, 17 and 18 are amended, and new ¶ 5A, 5B and 6A are added, to read as follows:

1. This action is brought as a class action. Plaintiffs include two physicians who as part of their practice regularly provide medically necessary abortions to indigent women, and an indigent pregnant woman eligible for the Medical Assistance Program ("Medicaid"), and for whom an abortion is medically necessary. [Beginning with its second sentence, ¶ 1 is otherwise unchanged.]

5A. Jane Doe is a pseudonym for a 38 year old indigent pregnant woman receiving Aid to Families with Dependent

Children public assistance, 42 U.S.C. §§ 601 *et seq.* and aid under the Medical Assistance Program ("Medicaid"), 42 U.S.C. § 1396 *et seq.*

5B. Plaintiff Jane Doe (a) has had nine previous pregnancies, two of which resulted in miscarriages.

(b) has a history of thrombophlebitis, a medical condition which, in her case, has been associated with varicose veins. In the opinion of her physician, there is, if she continues her pregnancy, a significant medical risk (about 30%) of deep vein thrombophlebitis, a condition which would impair her circulation and require prolonged hospitalization and bedrest. If she continues her pregnancy there is also a near certainty that her varicose veins will recur; this condition will require surgery. In her physician's judgment an abortion is medically necessary for her, though not necessary to preserve her life.

(c) is an aggrieved woman patient within the meaning of ¶ 14.

6A. Plaintiff Jane Doe brings this action as a class action on her own behalf and on behalf of all other similarly situated, pursuant to F.R.C.P. 23(a) and (b)(2). The class is defined as all pregnant women eligible for the Illinois Medical Assistance Programs [Ill. Rev. Stat. ch. 23 Art. V-VII] for whom an abortion is medically necessary, but not necessary for the preservation of their lives, and who wish such abortions performed. The class is hereinafter referred to as the "pregnant women class." The class is so numerous (thousands of women enter the class each year) that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiff are typical of the claims of the class; and the named plaintiff will fairly and adequately protect the interests of the class. The defendant has acted and is acting on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

16. Defendant Quern is currently enforcing P.A. 80-1091, or will imminently enforce, P.A. 80-1091 to deny reimbursement under the Illinois medical assistance programs for all medically necessary abortions (a) to plaintiffs Motew and Zbaraz and all members of the physician class, (b) to hospitals and clinics; (c) to all other medical providers; and (d) with respect to plaintiff Doe and all members of the pregnant women class.

17. As long as Illinois reimbursed them for performing medically necessary abortions for indigent pregnant women, plaintiffs Motew and Zbaraz and members of the physician class offered and performed such medically necessary abortions for members of the pregnant woman class. They wish to continue providing such medically necessary abortions for members of the pregnant women class, and will continue to do so if defendant Quern ceases enforcing P.A. 80-1091 to deny reimbursement for medically necessary abortions.

18. For the indefinite future, a large number of indigent women patients of Plaintiffs Motew and Zbaraz and other members of the physician class, and Plaintiff Doe and all members of the pregnant women class, will require and were it not for P.A. 80-1091 would seek and obtain, medically necessary abortions. However, because of P.A. 80-1091 they are unable to obtain medically necessary abortions other than ones necessary to save their lives, with resultant danger to their health and well-being.

B.

Except with respect to paragraphs 5(a), 6, 7 and 20, all references in the Complaint to "aggrieved women patients" are hereby amended to read "Plaintiff Doe, all members of the pregnant women class, and aggrieved women patients." The paragraphs so amended include paragraphs 21, 22, 23 and 27, and paragraphs (A), (C) and (D) of the Prayer for Relief.

The reference in paragraph 20 to "some aggrieved women patients" is amended to read "some members of the pregnant women class and some aggrieved women patients."

C.

A Public Act Number for H.B. 333 has been designated since the date of the complaint, and all references to H.B. 333 are hereby amended to refer to P.A. 80-1091.

Respectfully submitted,

/s/ ROBERT E. LEHRER

One of the Attorneys for Plaintiffs

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**UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc.,

Defendant.

No. 77 C 4522

AFFIDAVIT

JASPER F. WILLIAMS, M.D., being duly sworn, states as follows:

1. I am a resident of Chicago, Illinois. If called as witness, I would testify to facts stated herein based upon my training and experience as an obstetrical-gynecological physician.

2. My curriculum vitae is attached to my Motion to Intervene. My practice largely consists of the treatment of pregnant women and their preborn children during the course of pregnancy and childbirth and the complications thereof. I have directly managed an average of 500 pregnancies per year in the 21 year course of my profession, or approximately 10,500. Approximately one half of my present practice is as a consultant: I am present Chairman of the Ob-Gyn Dept. at St. Bernard Hospital and co-Chairman of the Ob-Gyn Dept. at Jackson Park Hospital. I am reimbursed through medicaid for the care of 40% of my patients. My patients are and have been almost exclusively Black—96-98%. I have treated and treat the complications of legal abortion in approximately 50 women per year: one woman has died in my care as a result of legal abortion: I have been consultant in four additional cases where

patients have died as a result of legal abortion. In the course of my practice as a physician, two women have died in my care during pregnancy—one of sickle cell crisis; one from pulmonary embolus. Neither death necessarily related to pregnancy.

3. I have read the affidavit of Dr. Depp submitted in this case.

4. I am aware that the State of Illinois will reimburse providers under its medical assistance program for abortions "necessary to preserve life." The standard proposed, "necessary to preserve life," is clear to me in the practice of my profession. Although whatever the procedure or medication contemplated, the physician must obviously approach treatment in light of the possible risks that the patient faces through his condition and the contemplated treatment. by training and experience I fully am able to conclude with reasonable medical certainty in an individual case that some course of treatment is necessary to preserve life or, for that matter, health. Indeed, it is my experience that making such judgments is the very nature of medical practice.

5. I have not, either in my practice or as a member of the abortion committee of Illinois Masonic Hospital for several years before abortion was generally legal, confronted a situation where abortion was necessary to preserve maternal life in view of alternative methods of treatment available. Although in approximately 10% of my patients pregnancy creates or exacerbates a "health" problem. I have not confronted a situation where abortion was necessary to preserve maternal health in view of alternative methods of treatment available.

6. It is not my experience that where pregnancy is "unwanted" that the mother will be at greater risk during the course of pregnancy or childbirth. In my experience, the majority of pregnancies are initially "unwanted;" likewise, the attitude of the mother toward pregnancy changes and the child is later "wanted" in the majority of pregnancies. Indeed, when a woman is pregnant with an "unwanted child"—whether

initially or throughout pregnancy—it is, in my experience, more likely that she will seek medical care than the woman who desires or is indifferent to pregnancy. This is so because the woman with the "unwanted" child has increased anxieties and will wish to minimize the impact of pregnancy upon her ambitions or life situations. In any event, the desires or preferences of my patients cannot and do not determine diagnosis or recommended medical practice.

7. For each and every medical condition for which Dr. Depp indicates pregnancy creates or exacerbates a threat to maternal health or life, alternate medical treatments other than abortion exist for which the physician might be reimbursed through medicaid. The variant risks noted by Dr. Depp for different classes—the young, old and the poor—simply indicate that a professional judgment made with reasonable medical certainty will vary based upon the circumstances of the individual case and that higher quality medical care might be required in some cases.

/s/ JASPER E. WILLIAMS, M.D.

JASPER E. WILLIAMS, M.D.

SUBSCRIBED AND SWORN TO
before me this 26th day of April,
1978.

/s/ THOMAS J. MORGEN

Notary Public

Honorable Alfred Y. Kirkland
United States District Court
219 South Dearborn Street
Room 1946
Chicago, Illinois 60604

Re: Zbaraz, et al. v. Quern, et al.
USDC ED Ill., Civil No. 77-C-4522

Dear Judge Kirkland:

This is to advise you that the United States requests intervention in the above captioned case pursuant to 29 U.S.C. § 2403(a). We understand, through conversations with your law clerk, Mr. Jay Price, that you will not require formal papers for this intervention. Accordingly, please consider this as our formal intervention application.

It is also our understanding that a simultaneous briefing schedule has been established requiring the initial briefs by March 12, 1979. While we are mindful of the Seventh Circuit's request to expedite this case, in view of the fact that the government has not been a party to this extensive litigation, we would request a two week extension of time. This office has not yet received all the papers filed in the earlier proceedings and will need time, once they are received, to review them before preparing our own response.

The attorney primarily responsible for handling this matter is Ann F. Cohen, who may be reached at (202) 633-4686. She will contact Mr. Price to discuss our request for additional time.

Very truly yours,

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

By: /s/ BARBARA B. O'MALLEY

BARBARA B. O'MALLEY
Director
Federal Programs Branch

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,
Plaintiffs,

v.

ARTHUR F. QUERN, Director, Illinois Department of Public Aid,
Defendant,

JASPER F. WILLIAMS, M.D., AND
EUGENE F. DIAMOND, M.D.,
Intervening Defendants.

No. 77 C 4522

Honorable
Alfred Y. Kirkland
Judge Presiding

MOTION FOR SUMMARY JUDGMENT

NOW COME Intervening Defendants, Jasper F. Williams, M.D. and Eugene F. Diamond, M.D., and move this court to grant a Summary Judgment pursuant to F.R. Civ. P. 56, upholding under the United States Constitution Title XIX as amended by the "Hyde Amendment" to the HEW-Labor Appropriations Act of 1979 and P.A. 80-1091, ILL. REV. STAT. ch. 23, §§ 5-5, 6-1, 7-1 (1977 Supp.), since there is no dispute over facts essential to the outcome of this litigation. A Brief in support of this Motion has been filed with this court.

/s/ THOMAS J. MARZEN

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

vs.

ARTHUR F. QUERN, etc., et al.,

Defendants.

No. 77 C. 4522

AFFIDAVIT OF OREN RICHARD DEPP, M.D.

OREN RICHARD DEPP, III, M.D., being duly sworn,
states as follows:

1. I am a resident of Chicago, Illinois. If called as a witness, I would testify to the facts stated herein based on my personal knowledge and experience.

2. I am Director of the Division of Obstetrics and Chairman of the Perinatal (High-risk Pregnancy) Center at Prentice Women's Hospital and Maternity Center of Northwestern Memorial Hospital in Chicago, Illinois. I am also Associate Professor in the Department of Obstetrics and Gynecology ("ob/gyn") and Head of the Section of Maternal-Fetal Medicine at Northwestern University Medical School in Chicago. I am licensed to practice medicine in the states of Illinois, Pennsylvania, Washington and Louisiana. I am board certified in the specialty of ob/gyn, which is the area of medicine concerned with the reproductive care of women. In addition, I am board certified in maternal-fetal medicine, which is a sub-specialty of ob/gyn concerned with the care of high-risk pregnancies. There are approximately 120 board certified

physicians in the sub-specialty of maternal-fetal medicine in the United States. A complete description of my medical qualifications and publications is attached to the previous affidavit I submitted in this case, on December 12, 1977 ("Depp I Affidavit").

3. I have practiced medicine in my specialty and subspecialty since 1963. During the time I was Director of the Fetal-Maternal Intensive Care Unit at Magee Womens Hospital in Pittsburgh, Pennsylvania, I was primary consultant for some 30,000 patients; since I have been at Prentice Women's Hospital and Maternity Center, I have supervised the perinatal health care of some 6,000 patients. I have personally examined several thousand women patients, including women who have desired to terminate their pregnancies. Many of my patients are poor, and many receive medical assistance from the State of Illinois. I have examined, and presently examine, pregnant women to evaluate health risks of their pregnancies. As Director of the High Risk Pregnancy Center at Prentice, I supervise the delivery of special, intensive health care services for women with high-risk pregnancies, in order to minimize the risks to them of childbirth and to enable them to carry their pregnancies safely to term.

4. I have reviewed the "Physician's Application for Payment for Abortion" (attached hereto), which describes the three circumstances in which abortions will be funded under the Illinois medical assistance program. In my professional opinion, the first two circumstances ("life-endangerment" and "severe and long lasting physical health damage") do not articulate criteria which a physician can apply in conformity with accepted standards of medical practice.

5. First, by requiring a doctor to certify that a pregnant woman's life *would have been* endangered or that severe and long lasting physical health damage *would have* resulted if the pregnancy were carried to term, the criteria require a certainty of prediction which is foreign to almost all medical judgments.

A physician's evaluation of a pregnant woman's medical condition and of the appropriate treatment of that condition cannot ordinarily be made in terms of certainty. Thus, with very rare exceptions—ectopic pregnancy, for example—specific medical conditions arising in or exacerbated by pregnancy cannot be predicted certainly to result in death or injury to the health of the pregnant woman. Individual patients can only be evaluated in terms of statistical risks and probabilities, based on the experience of a population of similar patients. Few such risks ever approach 100% certainty, though the particular risk which a specific medical condition poses and the nature of the injury presented by that risk may be very substantial from a physician's point of view. To take a common example, a pregnant woman with essential hypertension has a 20% risk of developing pre-eclampsia (toxemia), which presents (particularly for a woman over 35 with several children) a likelihood of seizures, pulmonary edema, heart failure, and renal shutdown.

6. Second, the requirement that the physician predict that the *life* of the pregnant woman would have been endangered, or that *severe and long lasting* physical health damage would have resulted to her, compounds the problem of requiring certainty of prediction. Physicians ordinarily cannot predict the quantity or degree of injury which may result from a particular medical condition. Health and disease exist along a continuum; that a patient will sustain precisely small or great injury to her health can rarely be ascertained beforehand. Thus, even if a doctor were to assume that a particular hypertensive patient will definitely develop pre-eclampsia (which, given the 20% risk factor, he obviously cannot do), he is still unable to predict the duration or severity of that medical problem.

7. Third, medical treatment seeks to avoid risks to "health." The terms "life . . . endangered," "severe," and "long lasting" are not terms which physicians ordinarily use in evaluating medical risks. Their meaning is, therefore, uncertain and open to a variety of interpretation. It is uncertain, for

example, whether "life-endangerment" means that childbirth must result in death or in a shortening of the woman's life. It is uncertain how "severe" and how "long lasting" a health condition must be in order for the woman to be certified for an IDPA-reimbursed abortion.

8. Fourth, even under a broad interpretation of their meaning, the criteria articulated in the Physician's Application would, in many instances, prevent a physician from certifying a patient for an IDPA-reimbursed abortion during the early stages of pregnancy when an abortion is far safer than one performed later. *See Depp I Affidavit*, ¶ 5. This is because the vast majority of medical problems associated with pregnancy appear during the early stages of pregnancy as uncertain health risks and do not reach the level of life-threatening or severe and long lasting health problems until later. This is particularly true of heart disease, where the likelihood of severe risk is not usually apparent until after the 28th week of pregnancy. It is also true for the leading causes of maternal mortality, hemorrhage and toxemia, *see Depp I affidavit*, ¶s 12, 13, which are ordinarily not predictable at all during the early stages of pregnancy. Thus, the conditions giving rise to toxemia and hemorrhage appear as uncertain, though definite, health risks during the early stages of pregnancy, and the possible consequences—hemorrhage or toxemia—do not become apparent until late in the pregnancy, when abortion is much riskier.

9. For women with serious health problems, delay in obtaining abortion may have even more serious consequences than it has for healthy women. The chance of incurring complications for both groups is the same, but the *consequences* of such complications are far more dangerous for a woman with a serious health problem. For example, a woman with a valvular heart disease has no greater chance of incurring infection from a late abortion than does a healthy woman, but if the former woman *does* incur infection, the con-

sequences—further destruction of her valves—are likely to be far more deleterious than in a healthy woman who incurs infection as the result of a late abortion.

10. In some instances, a physician may, by means of tests, predict with more certainty the risk a particular medical condition poses to a particular patient during the early stages of pregnancy. These tests, however, pose their own risks to the health of a patient. Thus, a woman with a history of liver disease has a medically significant risk in pregnancy. How substantial the risk is, however, cannot be known during the first trimester unless a liver biopsy is performed. But a liver biopsy has the inherent risk of hemorrhage or infection which in itself may be life-threatening.

11. What competent physicians can safely determine during the early stages of pregnancy is that a particular patient, evaluated on an individual basis, has a certain health profile which creates a higher than normal risk of adverse consequences to her health if her pregnancy is carried to term. (Exhaustive descriptions of all the medical conditions posing a risk to the health or life of the pregnant woman would require volumes of descriptions. The Depp I Affidavit (at ¶¶10-12, 14) describes some of these conditions.) A physician's evaluation of what risk of morbidity or mortality is excessive depends upon his evaluation of that risk to the particular patient as compared with the risk to the normal population. The current maternal mortality rate in the United States is 2/10,000, or 2/100 of 1%. Pritchard & MacDonald, eds., *Obstetrics* (15th ed. 1976). In my professional opinion, a 1% or higher risk of mortality is excessive or medically significant, since it represents a 50-fold increased risk of mortality over that to which the normal population is subject. Moreover, a 50-fold increased risk of mortality means an even higher risk of morbidity, because not all patients with significant risk of mortality die. The multiple of risk is probably on the order of four to ten (that is, a group with a pregnancy mortality rate of 1% would tend to have a

morbidity rate of 4% to 10%). Where a 1% or higher risk of morbidity or mortality exists together with a firm wish by the patient to terminate her pregnancy, I would consider an abortion to be medically indicated (or "medically necessary" or "therapeutic"). Given my threshold of intervention, I would estimate that somewhat fewer than 50% of women desiring abortions have a medical need for one. Some doctors, of course, have higher thresholds of intervention than I do and some have lower ones, but the percentage of abortions any physician would deem "medically necessary" is likely to fall between 20% and 50% of representative cases in which the pregnant woman wants an abortion.

12. That abortions are safer than childbirth in the first trimester does not make any abortion desired by a woman medically necessary. A woman with a normal pregnancy is not considered to be at risk, and the fact that she experiences health problems associated with a normal pregnancy (such as nausea, water retention, sleeplessness, lower back problems, contracting of organs, to name a few) does not make an abortion medically necessary. A pregnant patient's risk is viewed in relation to that of the normal pregnant population. Thus, for a woman to be at risk in pregnancy, the condition creating the risk is that not of normal pregnancy, but of abnormal health problems associated with or exacerbated by pregnancy. A decision that an abortion is medically indicated is made not because a woman does not want to remain pregnant but because she does not want to subject herself to the abnormal risk associated with her pregnancy.

13. Certain population groups are at higher risk in pregnancy than is the normal population. Depp I Affidavit, ¶s 15-17. This does not mean that membership in such a high risk group plus desire to terminate the pregnancy alone would be sufficient for an abortion to be considered medically necessary. For example, poor women are a high risk group. They are more likely to be poorly nourished and under serious stress and

are less likely to utilize, or have access to, adequate health care facilities. For those reasons, among others, a poor woman is more likely than a woman who is not poor to suffer from rheumatic heart disease and essential hypertension—conditions which pose serious risk to the woman's health in pregnancy. But before I could conclude that a poor woman has a medical need for an abortion, I would have to examine her to determine if she suffers from any of these conditions. Adolescent women comprise another high risk group, but before I could conclude that an abortion was medically necessary for a particular adolescent, I would have to examine her for those conditions which create the high risk associated with adolescence—for example, the size of her pelvis, the extent of her growth, and her eating habits. Likewise, in the case of a woman over 35, I would look, among other things, for signs of hypertension and gestational diabetes (abnormal glucose metabolism).

14. There is often more than one choice of treatment for a pregnant woman whose condition is such that she has a medical need for an abortion. But often abortion is the medically preferred choice. A patient who is forced to carry her pregnancy to term may be unwilling or unable to cooperate with special treatment to ameliorate the risks—such as giving up employment, obtaining extensive bed rest, making frequent hospital visits or obtaining outside help to take care of familial responsibilities. Moreover, alternative treatment is often more dangerous than abortion. For example, certain drugs such as apresoline or phenobarbitol may alleviate the effects of hypertension, but we simply do not know whether these drugs create other risks dangerous to maternal or fetal health. Diethylstilbestrol (DES) was commonly administered in the 1950's for certain groups of pregnant women at high risk in pregnancy. Only in the mid 1970's was it determined that DES in fact created a substantial risk of pre-malignant vaginal lesions among the daughters born of women who were administered this drug. Any drug has the possibility of adverse, if

sometimes remote, consequences, and before it may be administered, the woman would have to be willing to subject herself and her fetus to the associated risks.

15. The Physician's Application for Payment of Abortion does not comprehend the variety of factors, the uncertainties and the complexities inherent in medical judgments. It sets forth criteria which are foreign to accepted standards of medical practice. Its language appears to require physicians to make absolute judgments which they have been taught they cannot make and which they are unable to make confidently. In addition, doctors are aware that these criteria have been established with the intent of restricting abortion for moral or religious, rather than for medical, reasons. The restrictive intent is evidenced by the fact that a doctor must sign an elaborate certification form for abortion, but not for any other medical procedure covered by the Illinois medical assistance programs, and by the fact that *two* doctors must certify to severe and long lasting physical health damage, while no other procedures covered by the Illinois medical assistance programs require approval of two doctors. For these reasons, and because a physician would want to implement honestly any legal restriction imposed upon him, I and, I believe, virtually all of my professional colleagues would be most reluctant to certify patients for medical assistance abortions under the criteria set forth in the Physician's Application.

16. Because the criteria set forth in the Physician's Application do not permit doctors to certify abortions based on an abnormally high degree (in my opinion, a 1% or higher risk of mortality) of health risks, I consider them medically unethical. The criteria limit a doctor's choice of medically necessary treatment for non-medical reasons. In practice, they require a doctor to withhold medically necessary treatment to the point of certainty of death or serious consequences to health. In so doing, they conflict with the fundamental goal of medical

practice, which is to prevent morbidity and mortality by helping a patient choose treatment which has the least combined risk of morbidity and mortality.

17. Most health problems associated with pregnancy, for which I would consider an abortion to be medically necessary, would not, in my opinion, come within the scope of the new Illinois criteria. For example, a woman with sickle cell trait has a small, but far higher than normal, risk of injury to her health if her pregnancy is carried to term. Risks include acute pyelonephritis (kidney malfunction), premature labor, anemia and hemorrhage. Malnutrition is another example of a condition that, associated with pregnancy, creates a much higher than normal risk of health injury: toxemia, infection, premature labor, anemia, and a likelihood that delivery will be by cesarean section (which, in turn, poses a 26-fold increased risk of mortality over vaginal delivery). For both sickle cell trait and malnutrition, however, the risks of these types of injuries are less than certain—far less than 50%—and I could not certify a woman with either of these conditions under the Illinois criteria.

Essential hypertension is a medical condition more common in black, poor women than in the general population. This condition presents a significant risk of poor fetal growth, preeclampsia, eclamptic seizures, hemorrhage, aspiration pneumonia, delivery by cesarean section and anesthetic complication. The risk of these injuries occurring to a particular hypertensive individual, however, while medically significant, is uncertain. A woman with a history of thrombophlebitis has an increased risk of its recurrence in pregnancy, with a subsequent excessive risk of pulmonary embolus and death. But the consequences are substantially less than certain to occur, and I could not certify such women under the Illinois criteria.

Many conditions can be exacerbated by pregnancy so as to result in "severe" and "long lasting" physical health damage (under some definition of those terms). But the uncertainty of

predicting their outcome for particular women renders it impossible to certify women with these conditions for abortion under the Illinois criteria. For example, a woman exhibiting slight retinal eye damage resulting from diabetes is at risk in pregnancy. Pregnancy may exacerbate the condition to the point of death (the eye damage reflects a vascular condition which could affect other organs), it may cause permanent blindness, it may cause temporary blindness—which may, however, recur when the woman is older—or it may have no ill effects on the woman's eyesight. The physician's problem is reconciling such a condition with the new Illinois criteria is that there is simply no way of knowing ahead of time which, if any, effect a particular woman will suffer. Another example is a woman with sub-clinical kidney disease (pyelonephritis), a chronic, smoldering condition which is not detected until the reserve kidney function is used up. Pregnancy will cause such a condition to flare up with the possibility of serious consequences, including severe infection, septic shock, and loss of kidney. But the severity of the consequences cannot be known ahead of time. I would, accordingly, not feel that I could certify a woman with either of such conditions for a "life-endangering" or "severe and long lasting" abortion under the Illinois criteria.

18. In my professional opinion, the effect of the new Illinois criteria for abortion coverage under the medical assistance programs will be to increase substantially maternal morbidity and mortality among indigent pregnant women. First, given the uncertainty of prediction in terms of both likelihood and quantity of risk, doctors will be unable to certify most patients under the new Illinois criteria. But this does not, of course, change the fact of death or injury to a woman's health if an abortion is not performed. Thus, if only five women out of 100 suffering from a particular health condition will die, but a doctor cannot tell beforehand which five, he will be unable to certify any of these women for an abortion, and five will die. Moreover, if women with non-quantifiable health risks are forced to carry their pregnancies to term, the number of births

by cesarean section will at least double. Cesarean section for a healthy woman increases the risk of mortality 26-fold. For an unhealthy woman, the risk of mortality from cesarean section is higher.

Second, the inability to certify women with uncertain health risks will result in an increase in emergency terminations of pregnancy after the 28th week of pregnancy, when many conditions suddenly flare up and in fact become life-threatening. Such later terminations not only increase the risks of morbidity and mortality to the woman, but are likely to result in permanent neurological and developmental damage to the child who survives. (Terminations performed after viability are, of course, done with the object of creating a live child.)

Third, by its own terms, the Illinois criteria are *intended* to preclude coverage of most medically necessary abortions. They thereby assume the risk—and the certainty—that the failure to perform such abortion will result in health damage to many pregnant women.

/s/ OREN RICHARD DEPP, III
Oren Richard Depp, III

SUBSCRIBED AND SWORN to
before me this 21st day of
March, 1979.

/s/ ELNOR E. GREENFIELD
Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

vs.

ARTHUR F. QUERN, etc., et al.,

Defendants.

No. 77 C 4522

AFFIDAVIT OF PETER BARGLOW, M.D.

PETER BARGLOW, M.D., being duly sworn, states as follows:

1. I am a resident of Chicago, Illinois. If called as a witness, I would testify to the facts stated herein based on my personal knowledge and experience and on the medical literature and statistical data which are cited herein and which are recognized in the medical profession as reliable.

2. I am licensed to practice medicine in the state of Illinois and am board certified in the specialty of psychoanalysis. I am on the medical staffs of Northwestern Memorial Hospital in Chicago, where I am an associate attending physician in the Department of Psychiatry, and Michael Reese Hospital, where I am an attending physician in the Departments of Psychiatry and Obstetrics/Gynecology ("ob/gyn"). I am also on the faculty of Northwestern University Medical School as Head of the Section of Psychosomatic Medicine, associate director of graduate training in the Department of Psychiatry, and associate professor in the Departments of Psychiatry and Ob/gyn. In addition I am a faculty member of the Chicago Institute for Psychoanalysis. My sub-specialty in the field of psychiatry is

the psychiatric aspects of obstetrics and gynecology. I believe I am the only psychiatrist in the United States who has an academic appointment in a department of ob/gyn.

3. I have practiced medicine in my specialty since 1960. From 1964 to 1970 I was associated with the Crittendon Comprehensive Care Center, an outpatient facility for indigent, pregnant adolescents. I helped establish the Center's program and was involved in treatment, research, evaluation and consultation at the Center. Prior to the legalization of abortion, I was frequently called upon to evaluate pregnant women to determine if they were likely to commit suicide and could thus qualify for abortions necessary to save their lives—the only abortions legally permitted in Illinois prior to 1973. (This was prior to the Illinois Supreme Court's 1972 ruling that suicide did not come within the scope of coverage of "life-saving" abortions.) I have treated or evaluated over 1,000 women for problems associated with pregnancy. I have had extensive experience treating pregnant adolescents, women desiring abortions, and women with ambivalent feelings about abortion. I have had substantial experience treating victims of rape and incest, as well as treating women who had previously sought and obtained illegal abortions prior to 1973. As a member of the staffs of Northwestern Memorial and Michael Reese Hospitals, I have treated many low income patients. A partial list of my publications, some of which deal specifically with abortion, is attached to this affidavit.

4. In psychiatry, as in other areas of medicine, there is no certainty of prediction. A psychiatrist's evaluation of a woman's mental health, and of appropriate treatment to maintain or improve her health, cannot ordinarily be made in terms of certainty. It is undeniable, however, that requiring a woman to carry an unwanted pregnancy to term may have adverse mental health consequences for her. Unwanted pregnancy can precipitate mental illness and can cause further psychiatric deterioration in women already suffering from mental illness or

prevent improvement in their conditions. A woman forced to carry a pregnancy to term may become severely depressed or psychotic, may suffer impairment or paralysis of functioning, and may engage in such self-destructive behavior as self-starvation, self-inflicted injury (including self-inflicted or otherwise illegal abortion), and suicide. These pathologic reactions create risks of additional adverse consequences to the pregnant woman. Self-starvation, for example, creates a risk of toxemia, premature labor and delivery by cesarean section, which presents a substantially increased risk of mortality.

5. Although prediction is necessarily uncertain with respect to the future course of mental illness, a psychiatrist can evaluate the risks pregnancy poses to a particular woman by looking for signs and symptoms which have been associated with adverse consequences in other women. These signs and symptoms include evidence of losing touch with reality (e.g., delusions, hallucinations), non-sequential speech, flattening of affect (inappropriate lack of facial expression), withdrawal from loved ones, inordinate guilt over the woman's inability to manage a child, abuse of existing children, severe emotional reaction to prior pregnancies or to the present pregnancy (crying, desperation, threats of self-injury or of injury to others, being overwhelmed, hopelessness), previous history of postpartum psychosis or of psychiatric hospitalization, lack of social supports (e.g., a woman who lives alone, has no family, and is totally dependent on her livelihood), preexisting mental illness, and manic (hyperactive, frantic) activity. Predictions about mental illness are somewhat more difficult to make than predictions about physical illness because the symptoms of mental illness are not as quantifiable as those of physical illness. While the symptoms themselves may be objectively observed, the subjective judgment of the psychiatrist about what those symptoms mean for an individual is necessarily less certain.

6. The goals of any psychiatric intervention are to protect the patient, to create an environment in which recovery can take place, and to restore the patient to competence in familial,

social and occupational functions. Where some or all of the signs and symptoms of risk described in ¶ 5, which threaten those goals, coexist with a firm wish by the patient to terminate her pregnancy, abortion is an appropriate form of psychiatric intervention. Abortion under these circumstances is "medically necessary" or "therapeutic." This standard for intervention is the usual standard of psychiatric evaluation.

7. Based on the criteria described above, I would estimate that approximately 15% of a representative group of women desiring abortions have a psychiatric need for an abortion. I do not, in other words, consider abortion to be medically indicated for psychiatric reasons merely because the woman desires it and is likely to "feel better" as the result of it. A woman's choice and her attitude toward her pregnancy, on the other hand, are key to the evaluation of medical necessity when combined with particular mental health profiles. A woman with an unwanted pregnancy who is psychologically depressed or who is emotionally volatile, for example, fares far worse than a woman with the same problems who wishes to carry her pregnancy to term. She is likely to be psychologically unable to make contact with medical providers and to be neglectful of her medical condition, with the result that many such women suffer serious injury to their physical as well as mental health. See Erickson, "The Influence of Health Factors on Psychological Variables Predicting Complications of Pregnancy, Labor and Delivery," 20 *Journal of Psychosomatic Research* 21 (1976); Davids, DeVault & Talmadge, "Anxiety, Pregnancy, and Childbirth Abnormalities," 25 *Journal of Consulting Psychology* 74 (1961).

8. For a woman whose mental health is threatened by her pregnancy, and who wishes to terminate that pregnancy, abortion is not considered a radical form of intervention from a psychiatric point of view. Balancing the risks and benefits, the overwhelming weight of evidence from the psychiatric and obstetrical literature proves that women generally do very well emotionally following abortion. Certainly for such women,

there are fewer emotional problems from abortion than from childbirth. See, e.g., Brewer, "Incidence of Post-Abortion Psychosis: A Prospective Study," 32 *Obstetrical and Gynecological Survey* 600 (September, 1977); Patt, Rappaport, & Barglow, "Follow-Up of Therapeutic Abortion," 20 *Archives of General Psychiatry* 408 (April 1969); Eklund, "Induced Abortion on Psychiatric Grounds—a Follow-up Study of 479 Women," 30 *Acta Psychiatrica et Neurologica Scandinavica Supplement* 99 (1955).

9. While forms of intervention other than abortion usually exist, they are likely to be more radical, less effective, and thus less medically desirable than abortion. For example, institutionalization and forced feeding may avoid risks of suicide or self-starvation, but they may create a high risk to the particular woman of further deterioration by taking her out of her normal environment, forcing on her a sense of powerlessness, and depriving her of the ability to control her life. Psychotherapy, as an alternative form of intervention, is only effective if the woman is willing and able to cooperate. A woman with a firm wish to terminate her pregnancy is unlikely to cooperate with such alternative treatment. Drug therapy, an often effective form of intervention, can have deleterious effects on the fetus, while stopping such therapy may endanger the woman's mental health. Neither alternative would be desirable.

10. Statistically, poor women are more likely than are non-poor women to suffer adverse mental health consequences from unwanted pregnancy. There is a higher incidence of depressive illness and a higher rate of hospitalization for mental illness among the poor. Poverty adds to the seriousness of mental illness because the poor have far less effective social, familial and economic supports to help mitigate the severity of mental illness. Because they are more likely to be under stress, and to have a sense of powerlessness, they are less able to mobilize themselves to cope with their problems. The poor have less

access to medical facilities and are less likely to seek out medical care, particularly psychiatric care, until they suffer acute need. Thus a poor woman with an unwanted pregnancy is likely to fare far worse than a non-poor woman: she is less able to get either the mental health treatment or prenatal care that she needs, she may have to give up needed employment and thereby be without financial resources to care for herself, her child, and other existing children, and she is less able to find alternative solutions to deal with the problem of unwanted pregnancy as well as with her pre-existing psychiatric problems. I would estimate that approximately 25% of a group of low-income pregnant women would, after examination, be judged to have a psychiatric need for abortion.

11. Adolescent women comprise another "high risk" pregnancy group from a psychiatric point of view. Characteristics of adolescence—developmental immaturity, poorly developed capacity for impulse control, inability to assume responsibility for their own, let alone others' lives, and self-preoccupation—render most adolescent girls maturationally ill-equipped to cope with motherhood. Unwanted motherhood affects an adolescent more profoundly than any other event in her life. These girls tend to drop out of school and to remain uneducated, with minimal realization of their personal potential, arrested emotional and social development, and severe financial dependence. In studies of adolescents denied abortions, it was found that many demonstrated pathologic reactions, including frequent punitive hate reactions against the child and major social difficulties connected with care or placement of the child. See Levene & Rigney, "Law, Preventive Psychiatry and Therapeutic Abortion," 151 *Journal of Nervous and Mental Disease* 51 (1970); Hook, "Refused Abortion," 168 *Acta Psychiatrica Scandinavica Supplement* 1 (1963). I would estimate that approximately 35% of a group of low income, pregnant adolescents would, after examination, be judged to have a psychiatric need for an abortion.

12. I have read the Physician's Application for Payment for Abortion (attached hereto). With the possible exceptions of suicide and self-inflicted injury that results in severe and long lasting physical health damage, none of the psychiatric conditions that I have described in this Affidavit would come within the scope of coverage of the Physician's Application. (The likelihood of physical health damage resulting from the possibility of neglect in obtaining needed health care (see ¶ 7) is too remote and uncertain in individual cases to enable such women to be covered under these standards.) I believe that the scope of abortion coverage set forth in the Physician's Application is therefore unreasonable. It excludes a psychiatrically appropriate, safe form of medical intervention. It subjects poor women to risks of severe, possibly permanent mental health impairment. It interferes with a doctor's ability to help patients, and it does so for non-medical reasons.

13. Even if the Physician's Application is meant to cover women likely to commit suicide or to inflict severe and long lasting physical health damage on themselves, it articulates criteria that are foreign to standards of evaluation and prognosis in the practice of psychiatry. As I have stated (¶ 6), psychiatry looks to protecting the health and functioning capacity of patients, and psychiatric intervention is not withheld to the point of certainty or even likelihood of suicide or self-inflicted serious physical injury. Because doctors do not usually make these types of evaluations, I believe that the criteria will be open to varying interpretations and thresholds of intervention.

14. The criteria set forth in the Physician's Application are also ambiguous in that it is not at all clear that they in fact include suicide and self-inflicted injury within the scope of coverage. This ambiguity will also result in varying interpretations by doctors. On the whole, however, I believe that most doctors will be reluctant to certify "suicidal" patients under these standards. I do not believe—and I think most of

my colleagues would agree—that the criteria are meant to cover suicide or self-inflicted injury. First, I am aware that the intent of the new abortion funding criteria is a restrictive one and, therefore, probably contemplates only physical, or “involuntary” risks of life endangerment or physical health damage. Second, the previous Illinois standards for “therapeutic” abortion coverage, prior to the legalization of abortion, were held *not* to include the likelihood of suicide (*People ex rel. Hanrahan v. White*, 52 Ill. 2d 70, 285 N.E. 2d 129 (1972)), and I presume that the intent behind similarly conceived restrictions remains the same. Third, the Physician’s Application requires that the certifying physician be the one who performs the abortion. Since such physicians are not ordinarily trained to make evaluations of psychiatric behavior, I would assume that prognosis of suicide or self-inflicted injury is not meant to be covered.

15. Even assuming, however, that suicide and self-inflicted injury were certifiable under the criteria set forth in the Physician’s Application (and leaving aside the problem of who the certifying physician must be), I and, I believe, many of my colleagues, would find it almost impossible to certify patients under these criteria, in view of the lack of certainty in predicting the future course of mental illness (see ¶s 4, 5). Prior to 1973, I had extensive experience in evaluating patients for “therapeutic” abortion to certify the likelihood of their committing suicide (see ¶ 3). After nine years of seeing such patients, I came to the conclusion that, though a small number of patients threatening suicide do in fact carry out their threats if denied abortion, I was unable in all but a tiny fraction of cases (less than 1%) to predict which ones would commit suicide. I would, moreover, be unable to certify even the tiny fraction of “likely” cases (women with a history of suicide attempts and with frank psychoses—*i.e.*, exhibiting such overt symptoms as delusions, hallucinations, flattening of affect and disorientation) under the criteria in the Physician’s Application because of the certainty

those criteria require (that the woman’s life *would* have been endangered; that severe and long lasting physical health damage *would* have resulted). Predictability of human behavior—whether it be of suicide or self-inflicted injury—is simply never that certain.

16. Predictability in psychiatry is more certain (though never approaching 100%) in the later stages of pregnancy than in the earlier stages. A doctor has more time to monitor and evaluate a patient as the pregnancy progresses, and a suicidal patient is more likely to make overt suicidal gestures as the pregnancy progresses. But as the pregnancy progresses abortion becomes less safe, and for a psychotic patient, more traumatic. Thus by the time a doctor can reasonably predict even the likelihood of suicide, the time for a safe abortion may have passed.

17. In my professional opinion, many women—particularly young women—who are victims of rape or incest will not be eligible for abortion coverage under the new Illinois criteria because of the 60-day reporting requirement. It has been my experience that many—perhaps most—such women refuse altogether to report the incident because of fear of retaliation, shame, humiliation, exposure, and parental disapproval or anger. For those willing to make the necessary reports in order to obtain abortions, 60 days is not enough time to acknowledge pregnancy. Menstrual irregularity and mis-

information about menstruation preclude many adolescents from being aware within a 60-day period that they may be pregnant. This genuine lack of awareness is compounded by a subconscious defensive denial that pregnancy may have resulted from a traumatic event which most victims wish to forget. In my experience, few adolescent rape and incest victims acknowledge the possibility of pregnancy until at least three or four months have elapsed.

/s/ PETER BARGLOW

Peter Barglow

SUBSCRIBED AND SWORN to
before me this 21st day of
March, 1979.

/s/ ELNOR B. GREENFIELD

Notary Public

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

vs.

ARTHUR F. QUERN, etc., et al.,

Defendants.

No. 77 C 4522

AFFIDAVIT OF DAVID ZBARAZ, M.D.

DAVID ZBARAZ, M.D., being first duly sworn, states as follows:

1. I am a resident of Cook County, Illinois. If called as a witness, I would testify to the facts stated herein based on my personal knowledge and experience.

2. I am a Clinical Associate Professor at the University of Chicago Medical School, Department of Obstetrics-Gynecology. I am also an attending physician at Michael Reese Hospital. I am licensed to practice medicine in the State of Illinois, and am board-certified in the specialty of obstetrics-gynecology, the area of medicine concerned with the care of women, as it affects their reproductive capacity. In order to be board-certified, a physician must pass oral and written examinations after practicing a specified number of years in the specialty (four years of post graduate study plus two years of specialized practice for obstetrics-gynecology).

3. I have practiced medicine in my specialty since 1966. From 1970 to 1975, I was Director of the Mandel Clinic, an obstetrical-gynecological ambulatory care facility at Michael Reese Hospital; I continue to see Clinic patients regularly as part of my duties as attending physician at Michael Reese. The Clinic serves primarily indigent women, most of whom receive medical assistance from the State of Illinois. I have personally examined several thousand women at the Clinic, and have supervised the care of several thousand more. I also have a private practice, serving primarily middle- and upper-income women, none of whom receive medical assistance from the State of Illinois.

4. I have reviewed a document entitled "Physician's Application for Payment for Abortion" (attached hereto) which specifies the conditions under which the State of Illinois will pay for abortions under the Illinois medical assistance programs. The application states that payment for abortion is made in only three situations: (1) when a physician can "determine . . . on the basis of . . . [his] professional judgment that the life of the mother would have been endangered if the fetus were carried to term"; (2) where a physician can "determine . . . on the basis of [his] professional judgment that severe and long lasting physical health damage to the mother would have resulted if the pregnancy were carried to term"; (3) in limited instances of rape and incest.

5. I have evaluated the first two descriptions of when Illinois will cover abortions under its medical assistance programs, in terms of whether, given the current state of medical knowledge, they contain criteria which a physician can apply in conformity with accepted standards of medical practice. In my professional opinion, they do not contain such criteria; to the contrary, they articulate criteria antithetical to accepted standards of medical practice, and, in fact, require a physician who wishes to perform only authorized abortions to commit what—in the absence of financial considerations—generally would be considered malpractice.

6. The application states that for an abortion to be covered, a physician must certify that in his professional judgment, a woman's life "*would have been* endangered," or that "severe and long lasting physical health damage . . . *would have resulted,*" without an abortion (emphasis added). I read these standards to require a physician to predict, with certainty, both that specific medical conditions or illness will result in some injury to a pregnant woman, and the severity and duration of the injury. But except in rare situations, such as ectopic pregnancies, certainty with respect to either the fact of injury at all, its severity, or its duration, is simply not possible.

(a) Women suffering from any number of specific health conditions or illness prior to pregnancy face a statistically significant risk of mortality or morbidity from pregnancy and childbirth. For example, pregnant women with hypertension experience a significantly increased risk of stroke (and possible resultant brain damage), premature delivery and fetal death, over that of the normal population. If the hypertension is exacerbated by pregnancy, they have an increased risk of eventually suffering organ damage. Yet, with respect to any individual woman patient, it is impossible to predict that she will definitely suffer any of these medical problems, or the severity or duration of these medical problems if they do occur. Women who are obese, or anemic, or who have a history of heart disease, are other examples of high risk groups with increased rates of morbidity and mortality from pregnancy. A physician is similarly unable to predict with certainty that an individual woman in these groups will suffer health damage from pregnancy, or that the damage will be "severe" or "long lasting."

(b) The same uncertainty about a physician's predictions exists with respect to conditions which have their onset during pregnancy. For example, uterine fibroid (non-malignant) tumors may have their onset during pregnancy, or their growth may be spurred by pregnancy. If the tumor grows—which it

may not do until the second trimester—the woman faces an increased risk of spontaneous abortion, various complications in labor, and hemorrhage during and after pregnancy. That the population of women with such tumors is at increased risk, however, does not mean that all women will suffer these consequences: on the contrary, it means that some women will not. Thus, growth of the tumor for some women involves merely swelling, without associated discomfort, and which subsides after pregnancy. On the other hand, perhaps 10% of women with fibroid tumors experience such pain and bleeding that they eventually require surgery—either a myomectomy (to remove only the tumor) or a hysterectomy (to remove all the reproductive organs). The point is that it is impossible to predict, with any certainty, for any individual woman patient with a fibroid tumor, what consequences growth of that tumor will have for her. In other words, it is not possible to state with certainty, with respect to any individual woman with a fibroid tumor, that her life “would have been endangered” or that “severe and long lasting physical health damage” would have resulted to her, unless an abortion were performed.

(c) Pregnant adolescent girls, those under 17 years of age, have substantially greater rates of mortality and morbidity from pregnancy and childbirth than does the normal population. They are more likely to suffer from toxemia and pre-eclampsia, which present a risk of serious kidney damage, and are potentially fatal. Moreover, adolescents are more likely—because of having an underdeveloped pelvis—to require surgical intervention and caesarean section for delivery, with concomitant risk from the surgery of morbidity and mortality in that childbirth and any future childbirth (which necessarily also will be done by caesarean section). There are some adolescents, of course—those who are unusually physically mature, and otherwise well-nourished, healthy, and willing and able to follow a physician's instructions—for whom continuing pregnancy is not medically unwise. I have seen such patients at

Michael Reese, at the clinic for high-risk pregnant women. Many, however,—perhaps 10% of the rest—will encounter the serious complications I have described. Again, the point is there is no way a physician can know which of these adolescent patients will definitely suffer such complications, and thus no way to honestly certify that an abortion is eligible for reimbursement by the State of Illinois, until severe toxemia, for instance, actually occurs. This is because there are no studies demonstrating that for any age group—even those under 13—pregnancy is *always* life-endangering, or even life- or health-endangering for 51% of the population at risk (that is, one could not honestly certify that health damage even was “more likely than not” to occur). To wait for the actual onset of toxemia, however, in an adolescent at risk who wanted an abortion, would further endanger the patient, and would be improper medical care.

(d) Plaintiff Jane Doe presents another example of the impossibility of applying the Illinois standard. Plaintiff Doe was a grand multiparous (i.e. she had had multiple pregnancies) 38 year old woman with varicose veins. Continuation of her pregnancy presented a significant medical risk of increasing the varicosity, leading to increased swelling and pain. Had she actually developed a blood clot (venous thrombosis), which then caused pulmonary embolus, she could have died. Far more likely, however, was that the increased varicosity would have mandated surgery to strip (surgically remove) the veins and relieve the swelling and pain. In either case, however, it would be impossible to state that plaintiff Doe's life “would [have been] endangered” or that she “would have” had “severe and long lasting physical health damage” without an abortion. The present state of medical knowledge forecloses a physician from stating with certainty that pregnancy would have so exacerbated plaintiff's varicose veins as to cause her further health damage, much less from stating certainly the severity or duration of any injury she might incur. A physician

can state only that plaintiff Doe had a significantly increased risk (as compared with the normal pregnant population) of having complications endangering her health. An abortion for her was thus "medically indicated," or "medically necessary." (See ¶ 7(b) *infra*.)

(e) The lack of certainty about predictions extends to even the most serious of potentially life-threatening conditions. For example, women with sickle cell disease have a 25% probability of going into sickle cell crisis and dying as a result of pregnancy. (The normal pregnancy mortality rate is 20 per 100,000.) Because of this extraordinarily high mortality rate, abortions for women with sickle cell disease are almost universally acknowledged to be "medically necessary." I would thus actively counsel such women to have abortions, unless they expressed a very strong desire to have the child. Yet it simply cannot be known, however careful her care and physician's monitoring, whether a particular patient will go into crisis, or whether the state of her disease will remain unaffected by pregnancy. It would not be proper medical care to wait for such an actual threat before terminating the pregnancy, if the patient did not want to incur the risk. Yet the Illinois standard, by requiring certainty about the outcome of a pregnancy, does not comprehend this inherent uncertainty in medical judgment prior to the onset of actual health crises.

In sum, as the above examples indicate, predictions about a pregnant woman's health condition only rarely can be made with certainty: for an individual woman patient, predictions about the fact of injury resulting from a medical condition, its severity, and duration can be expressed at best in terms of likelihood and probability, not of certainty. Individual patients can be, and are, evaluated only in terms of statistical risk, based on the experience of a population of similar patients, as compared with the norm; the risk almost never is 100%, though it may well be substantial from a medical perspective.

7. Although the Application requires that I predict with certainty "that severe and long lasting physical health damage" would have resulted to a pregnant woman, unless an abortion were performed, I am uncertain how to evaluate the concept of "severe and long lasting" physical health damage. Whether physical injury is "severe" and "long-lasting" is a subjective judgment, which varies with the perception and individual circumstances of the patient: whether loss of a finger is "severe," for example, may be perceived differently by a pianist or a truck driver. In this sense, whether a particular condition is "severe" and "long lasting" is not a judgment which a physician can make, and they ordinarily do not make medical judgments in such terms. Physicians are trained to make medical judgments about whether a patient faces statistically significant risks to her health, and what the nature of those risks are: evaluation of the appropriate treatment for a pregnant woman is based on what risks she is willing to incur, in light of the alternative treatments of her condition (e.g. therapeutic abortion, drugs) available.

8. Pregnancy is not a disease. It usually results in changes in a woman's system none of which, singly or together, in their usual form would make an abortion "medically necessary" or "medically indicated." Normal health problems in pregnancy include breast tenderness, increased vaginal discharge, decreased resistance to colds, mild anemia, edema, constipation, shortness of breath, decreased tolerance of exercise. For women with special health problems, however, these "normal" conditions can become exacerbated, or can themselves exacerbate pre-existing conditions. Women with severe classic (iron-deficiency) anemia, for instance, incur significantly higher morbidity and mortality than do women who are only mildly anemic because of the pregnancy. Women with bronchitis, emphysema, asthma, or who are heavy smokers, are statistically more likely to develop pneumonia, and require hospitalization, than are women with normal "shortness of breath." It is women

who run a significant risk that their other health problems will be exacerbated by pregnancy, or who have statistically significantly greater morbidity and mortality rates than the norm, for whom abortion is "medically necessary" or "medically indicated."

9. In judging what abortions are "medically necessary," the actual circumstances of the patient and her likely future behavior are essential considerations. Theoretical alternatives to abortion are not considerations if they are not actually available to the patient. A pregnant woman with varicose veins, for instance, can substantially lower any risk she faces with complete bedrest. This is not an alternative for a woman, such as plaintiff Jane Doe, with small children. A more extreme example is that of women drug addicts, who often do not seek out any medical care at all during pregnancy. Their continued drug use, combined with malnutrition and a complete absence of medical care, increases their mortality and morbidity rates—and the risk of fetal damage—several fold over the norm. In considering whether an abortion were "medically necessary" for such a woman, a physician would have to weigh the possibility that she could terminate her drug use and receive regular medical attention against the actual likelihood that she would do so.

10. Even a pregnant woman with health problems such as those described in paragraph 6, who desires to and does cooperate with her physician, can only somewhat increase her chances for avoiding death, or damage to her health. Even women who are able to and do cooperate completely—and women who do not want to be pregnant are less likely to fall within this category—have increased morbidity and mortality rates simply because the course of a patient's illness is neither altogether controllable nor altogether predictable.

11. Low income women with health problems have higher morbidity and mortality rates from pregnancy than do similarly situated women with higher incomes.

(a) Low income women tend to be less well-nourished. It is not uncommon for low-income women to be anemic because of pica (ingesting non-nutritious substances such as clay or Argo starch), a phenomenon considerably less common to middle—and upper-income women.

(b) Routine care for pregnancy includes being seen by a physician once a month for 6½ months, once every three weeks through 8 months, once every 2 weeks through 9 months, and once a week thereafter. High risk care means being seen by a physician once every two or three weeks for seven months, and once a week thereafter. Such frequent visits—with immediate hospitalization as needed—would be the minimum care required for women with health problems such as those described in paragraphs 6, 8, and 9.

(c) Low income women tend to have less access to adequate medical care. Unless they are being seen at a High Risk Pregnancy Center, such as Michael Reese, their doctors are less likely to have hospital privileges, or to have them at hospitals which are equipped to treat high-risk pregnancies. It is my experience that such women often are routinely referred by their doctors to Cook County Hospital when crises occur. It often is not impressed upon them, or they do not comprehend, the seriousness of their condition, and thus they often do not seek or receive hospital care until serious damage to their health has been done.

(d) These problems of low-income women are exacerbated with adolescents, who tend not to be emotionally mature enough to realize the implications of pregnancy or to commit themselves to the care it requires. While intensive high risk care can lessen their problems, such care is not available to, or is not sought out by many indigent pregnant adolescents.

12. (a) Both at Michael Reese and in my private practice, I have had occasion to treat numerous adolescent and older women who were victims of statutory and forcible rape. A

substantial number of my patients did not report the crime to the police (or to any public health or other law enforcement agency). This was because they experienced such feelings as fear, shame, embarrassment, and guilt. In my professional opinion, it would be improper medical care for a physician to withhold medical care (including abortion) from a rape victim because she did not report the crime to the police. Requiring such victims to speak to the police would only increase the emotional pain and trauma attendant upon the rape.

(b) An adolescent often will not realize she is pregnant until more than two months after conception. This is because menstrual periods in adolescents tend to be irregular, a tendency which is especially pronounced in the very young. Moreover, a denial mechanism tends to operate in adolescents, preventing them from admitting even to themselves that they are pregnant. As a result, it has been my experience that many adolescents do not seek out medical care for pregnancy—either abortion, or assistance in carrying the pregnancy to term—until more than two months after conception. At this point it is too late to comply with the “reporting” requirements of the new Illinois abortion-funding standards, even if “reporting” were not injurious to the health of the patient (which in many cases, it would be.)

Further affiant saith not.

/s/ DAVID ZBARAZ, M.D.

DAVID ZBARAZ, M.D.

SIGNED AND SWORN TO
before me this 21st day of
March, 1979.

/s/ JAMES B. HADDAD

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc., et al.,

Defendants.

No. 77 C 4522

MOTION FOR SUMMARY JUDGMENT

NOW COMES the defendant, ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, by his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and moves this Honorable Court grant him summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that:

1. Illinois policy governing the funding of abortions through its medical assistance programs as modified by this Court's injunction is not violative of plaintiffs' due process and equal protection rights under the Fourteenth Amendment to the United States Constitution, and;

2. The Hyde Amendment to Title XIX of the Social Security Act does not violate plaintiffs' rights under the Fifth Amendment to the United States Constitution.

3. There are no disputed issues of material fact.

WHEREFORE, defendant Quern submits his Memorandum of Law on the Constitutional Questions in support of this motion and requests this Honorable Court grant summary judgment in his favor.

Respectfully submitted,

/s/ WILLIAM J. SCOTT
 WILLIAM J. SCOTT
 Attorney General
 State of Illinois

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Honorable Alfred Y. Kirkland
 United States District Judge
 219 S. Dearborn Street
 Chicago, Illinois 60604

Re: Zbaraz v. Quern, etc., et al.;
 U.S.D.C., N.D.Ill., Civil
 Action No. 77 C 4522

Dear Judge Kirkland:

In accordance with our status as the federal defendant-intervenor, please consider our Memorandum in Support of the Constitutionality of the Hyde Amendment, filed with the Court on March 22, 1979, to include a motion for summary judgment on our behalf. Unless otherwise instructed, I will assume that no further pleadings are required on our behalf.

Very truly yours,

BARBARA ALLEN BABCOCK
 Assistant Attorney General
 Civil Division

By: /s/ BARBARA B. O'MALLEY
 Barbara B. O'Malley
 Acting Director
 Federal Programs Branch

cc: Robert W. Bennett, Esquire
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc.

Defendant.

No. 77 C 4522

AFFIDAVIT

KENNETH H. WILSON, being duly sworn on oath,
deposes and says that:

1. I am employed by the Illinois Department of Public Aid, in Springfield, Illinois, as Chief of the Bureau of Provider Services of the Medical Assistance Program.

2. It is the normal practice of the Department of Public Aid when it receives a bill for services rendered by a physician participating in the Medicaid Program, to pay that bill when the billing form is properly made out and any necessary documentation is included, without seeking further corroboration of the diagnosis. Only when there exists evidence of fraud or abuse is the bill further examined. Specifically, this general policy is followed when a physician makes an "APPLICATION FOR PAYMENT FOR ABORTION WHERE SEVERE AND LONG LASTING PHYSICAL HEALTH DAMAGE TO MOTHER WOULD HAVE RESULTED" and the form for payment therefore has been properly executed, including the required certification by two physicians.

3. Affiant says nothing further.

/s/ KENNETH H. WILSON

Kenneth H. Wilson,
Chief Bureau of Provider Services

State of Illinois
County of Sangamon

SUBSCRIBED AND SWORN TO
Before me this 3rd day of
April, 1979.

/s/ KATHY A. BADER

NOTARY PUBLIC

**CENTER FOR DISEASE CONTROL,
MORBIDITY AND MORTALITY WEEKLY REPORTS
FEBRUARY 2, 1979, VOLUME 28, NO. 4**

Epidemiologic Notes and Reports

**Health Effects of Restricting Federal Funds
for Abortion—United States**

In August 1977 federal funds for abortion for Medicaid-eligible women were restricted. To measure the impact of this restriction on abortion-related complications, CDC initiated a hospital surveillance project in 13 states and the District of Columbia. No increase in abortion-related complications was observed in this surveillance project.

CDC also maintains nationwide surveillance of abortion-related mortality. Since October 1977, 3 deaths of Medicaid-eligible women have been reported in states not providing public funds for abortion: 1 of the deaths (1, 2) was directly related to the absence of public funds; the other 2 were indirectly related.

CDC's surveillance of abortion deaths began in 1972, but the hospital surveillance project was initiated in October 1977, following the issuing of regulations on August 4 to restrict funds for abortions to only those procedures necessary to save a woman's life. On February 14, 1978, HEW published regulations that broadened the indications for federal funding for Medicaid-eligible women to include situations in which 1. the woman's life would be "endangered" if the pregnancy were carried to term; 2. "severe and long-lasting physical health damage" to the woman would result if the pregnancy were carried to term, as certified by 2 physicians; or 3. the pregnancy resulted from statutory or forcible rape or from incest, providing that the incident was reported to a law enforcement agency or a government health service within 60 days of its occurrence.

The Hospital Surveillance Project

Data on women coming to obstetric, acute-care facilities were collected from 24 institutions located in the District of Columbia and 13 states across the country from October 10, 1977, through June 10, 1978. Ten institutions were located in states in which, because of the absence of public funds, legal abortions might be less available: 14 were in states that were continuing to use state funds to finance Medicaid abortions. Out of the 3,157 abortion complications* reported through this hospital surveillance project, 7 occurred after admitted illegally induced procedures. In 3 other instances in which complications occurred, the women did not name the source of the abortion; for analytic purposes, it was assumed that these women also underwent an illegal or self-induced abortion.

None of these 10 complications occurred in women reported to be a Medicaid recipient. No abortion deaths related to either illegal or legal abortions were detected through the hospital surveillance. There was also no significant difference between institutions in funded and non-funded states in the proportion of Medicaid women with abortion complications over the 8-month period.

However, the restriction of public funds was found to be significantly associated with a later gestational age at the time of the abortion. In non-funded states Medicaid-eligible women with complications after legally induced abortions had a 1.9 week later mean gestational age than their counterparts in funded states ($p > 0.07$). Moreover, Medicaid-eligible women in non-funded states had a 2.4 week later mean gestational age than non-Medicaid-eligible women in the same states ($p < 0.01$); in funded states, Medicaid-eligible and non-Medicaid-eligible women had similar mean gestational ages.

* An abortion complication included any illness related to either an induced or a spontaneous abortion that caused a woman to come to the acute-care facility at a participating hospital.

Nationwide Mortality Surveillance

Although no abortion-related deaths were detected through the hospital surveillance project, 3 abortion-related deaths of Medicaid recipients living in non-funded states have been documented since August 4, 1977, through CDC's epidemiologic surveillance of abortion mortality. One was directly related to the absence of public funds for abortion: a 27-year-old woman who died in a hospital on the Texas-Mexico border on October 3, 1977, from septic complications of abortion (1,2).

In the other 2 instances, the abortion-related deaths appeared to be indirectly related to the absence of public funding. In 1 case, the Medicaid-eligible woman delayed her procedure, in part due to medical reasons, in order to locate a facility which would perform a combined abortion and concurrent sterilization procedure with public funds. In the second case, a Medicaid-eligible woman was informed by 2 free-standing abortion clinics that she was too far advanced in pregnancy to allow the suction curettage procedure that she was planning to finance with private funds. After learning this, and because procedures performed later in pregnancy are more expensive, she attempted to induce an abortion herself, which eventually produced complications requiring a hysterectomy. She died from a pulmonary embolism 10 days after the hysterectomy.

Reported by R. Bragonier, MD, Harbor General Hospital, Torrance, R. Sweet, MD, San Francisco General Hospital, San Francisco, Calif; W. Wilson, MD, Denver General Hospital, Denver, Colo; R. Hatcher, MD, Grady Memorial Hospital, Atlanta, Ga; N. Winn MD, Kapiolani Hospital, Honolulu, Hawaii; U. Freese, MD, Cook County Hospital, Chicago, Ill; R. Buchanan, RN, Johns Hopkins Hospital, Baltimore, Md; P. Darney, MD, Boston Hospital for Women, Boston, Mass; J. Tomakowski, Hutzel Hospital, Detroit, Mich; J. Batts, Jr. MD, Harlem Hospital, B. Lieberman, MD, Bellevue Hospital, New York, NY; D. Ucker, MD, Grant Hospital, Columbus, J. Palo-

maki, MD, University Hospital, Cleveland, Ohio; P. Kirk, MD, Emmanuel Hospital, Portland, Oreg; J. Polin, MD, University of Pennsylvania Medical Center, Philadelphia, R. Rajan, MD, Temple University Hospital, Philadelphia, D. Thompson, MD, Magee Womens Hospital, Pittsburgh, Pa; E. Gold, MD, Women and Infants Hospital, Providence, RI; L. Del Castillo, RN, Brownsville Hospital, Brownsville, J. Duenholter, MD, Parkland Hospital, Dallas, J. Furman, Thomason Hospital, El Paso, N. Golden, RN, Sierra Medical Center, El Paso, E. Pradoran, RN, McAllen Hospital, McAllen, Tex; S. Jones, MD, DC General Hospital, Washington, DC; and the Abortion Surveillance Br. Statistical Services Br, Family Planning Evaluation Div. Bur. of Epidemiology, CDC.

Editorial Note: A pregnant Medicaid-eligible woman in a state which does not fund abortions has several alternatives. She may: 1. carry her pregnancy to term. 2. seek and qualify for a Medicaid-funded, legally induced procedure, 3. use private funds for a legally induced abortion, 4. seek a less expensive abortion from an unlicensed practitioner, and/or 5. attempt to abort herself. The hospital surveillance project was primarily designed to examine whether there would be an increase in self-induced or non-physician-induced abortions, since these options have the greatest potential for causing an increase in morbidity and mortality (3). For example, in 1972, before abortion became widely available in the United States, illegal abortion was responsible for 39 deaths; 5 years later in 1976, only 3 fatalities resulted from illegal abortion (4). However, no increase was noted, supporting the inference that Medicaid-eligible women are not choosing self-induced or non-physician-induced abortions to any large extent. CDC has initiated an active surveillance system for reporting of sporadic cases of illegal abortion complications when they occur—whether or not they are related to public funding.

CDC does not have data to explain the later mean gestational age after legally induced abortions in Medicaid-eligible women observed in non-funded states. For each week

of delay after the sixth week of gestation, the risk of complications after legally induced abortions increases approximately 20%; the risk of death increases approximately 50% (5, 6). Because of the rarity of complications associated with legal abortion, such an increase, if present, was not detectable in the hospital surveillance project.

References

1. MMWR 26:361, 1977
2. MMWR 27:71, 1978
3. Cates W. Jr, Rochar RW: Illegal abortion in the United States, 1972-1974. *Fam. Plann. Perspect.* 8:86-92, 1976
4. CDC: Abortion surveillance, 1976. Issued August 1978
5. Cates W. Jr, Schulz K.F., Grimes D.A., Tyler C.W. Jr: The effect of delay and method choice on the risk of abortion morbidity. *Fam. Plann. Perspect.* 9 266-278, 1977
6. Cates W. Jr, Tietze, C.: Standardized mortality rates associated with legal abortion: United States, 1972-1975, *Fam. Plann. Perspect.* 10:109-112, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc., et al.,

Defendants.

No. 77 C 4522

DEFENDANT QUERN'S MOTION TO REQUIRE FEDERAL REIMBURSEMENT FOR ALL MEDICALLY NECESSARY ABORTIONS

NOW COMES ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, by and through his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and moves this Honorable Court for an order requiring the federal government to reimburse the State of Illinois for all medically necessary abortions performed under the terms of this Court's order of April 29, 1979 with respect to recipients of medical assistance under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* and in support states as follows:

1. Under this Court's opinion and order of April 29, 1979, Illinois is required to fund all medically necessary abortions for recipients of medical assistance under, *inter alia*, the medicaid program, 42 U.S.C. § 1396 *et seq.*

2. Under 42 U.S.C. § 1396b the Secretary of the Department of Health, Education and Welfare is obligated to reimburse participating states for amounts expended by such states as medical assistance for eligible public aid recipients. The amount of reimbursement due the State of Illinois for all medical assistance provided indigent persons approximates 50% of the total amount expended. 42 U.S.C. § 1396b(a)(6).

3. Defendant Quern's attorney in this case has been informed by both the Assistant United States Attorney assigned to this case in the Northern District of Illinois and the Assistant United States Attorney assigned to this case in the Justice Department in Washington, D.C., that the Department of Health, Education and Welfare does not intend to reimburse Illinois for any non-Hyde Amendment medically necessary abortions ordered by this Court to be provided by the State of Illinois to pregnant indigent women.

4. As the Medicaid Program is a program of cooperative federalism under which states are required to comply with federal requirements in order to qualify for federal financial participation, it is inequitable to require Illinois to bear the full cost of providing non-Hyde Amendment medically necessary abortions. Moreover, Illinois is entitled to such reimbursement under the expressed terms of Title XIX.

WHEREFORE, Defendant Quern respectfully requests this Honorable Court to include within the provisions of the final injunction and order to be entered in this case an expressed requirement that the Department of Health, Education and Welfare shall reimburse Illinois at its usual percentage

for all non-Hyde Amendment medically necessary abortions which Illinois will be required to perform under the terms of this Court's order.

Respectfully submitted,

/s/ WILLIAM J. SCOTT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., MARTIN
MOTEW, M.D., on their own be-
half and on behalf of all others
similarly situated; CHICAGO
WELFARE RIGHTS ORGANI-
ZATION, an Illinois not-for-profit
corporation, and JANE DOE, on
her own behalf and on behalf of all
others similarly situated,

Plaintiffs,

v.

ARTHUR F. QUERN, Director, Il-
linois Department of Public Aid,

Defendant,

and

JASPER F. WILLIAMS, M.D. and
EUGENE F. DIAMOND, M.D.,

Intervening Defendants,

and

THE UNITED STATES,

Intervening Defendant.

No. 77 C 4522

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1252

from the following judgments, holdings, orders and decrees of this named action:

1. Appeal is taken from the Final Judgment and Order of this court entered in this action by Judge John F. Grady dated April 30, 1979 whereby this court adjudged an Act of Congress and certain Illinois statutes partially unconstitutional, enjoining the Illinois statutes in part. The laws so adjudged and enjoined state:

"The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, § 5-5 (1977 Supp.).

"Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, § 6-1 (1977 Supp.).

"Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the

opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child." P.A. 80-1091; Ill. Rev. Stat. ch. 23, § 7-1 (1977 Supp.).

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." § 201 of Pub. L. 95-484, 92 Stat. 1586, Oct. 18, 1975, the "Hyde Amendment," an Act of Congress.

The Final Judgment and Order of this court herein appealed were fashioned pursuant to the Memorandum Opinion of this court in this named action by Judge John F. Grady of April 27, 1979, holding the "Hyde Amendment and P.A. 80-1091 are unconstitutional as applied to medically necessary abortions prior to the point of viability." Memorandum Opinion, at 13.

2. Appeal is also taken from the Judgment and Order of the United States Court of Appeals for the Seventh Circuit, dated February 13, 1979, in *Zbaraz et al. v. Quern et al.*, Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029, fashioned pursuant to the Opinion of the Seventh Circuit (dated and titled in the same manner as the Final Judgment and Order), where the Seventh Circuit held P.A. 80-1091 inconsistent with Title XIX of the Social Security Act (Medicaid), 42 U.S.C. § 1396 *et seq.*, insofar as P.A. 80-1091 failed to provide state funds for abortion to the extent 201 of Public Law 95-480 amended Title XIX.

3. Appeal is also taken from the Injunction issued by this court by Judge Alfred Y. Kirkland, in this named action, dated February 13, 1979, fashioned pursuant to the Mandate, Final Judgment, Order, and Decision of *Zbaraz et al. v. Quern et al.*, Nos. 78-1669, 78-1709, 78-1787, 78-1890, 78-1891, 78-2029 (7th Cir., Feb. 13, 1979), enjoining P.A. 80-1091 in the following manner:

"Pursuant to the mandate of the Court of Appeals for the Seventh Circuit contained in its Judgment and Opinion of February 13, 1979, this Court hereby modifies its permanent injunction entered on May 15, 1978 to provide:

This Court hereby orders that defendant be permanently enjoined from:

(1) enforcing Ill. Rev. Stat. Supp. (1977) ch. 23, §§ 5-5, 6-1, 7-1 to deny payments under the Illinois medical assistance programs to plaintiffs Zbaraz, Motew, and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for: (a) abortions when the life of the mother would be endangered if the fetus were carried to term; (b) such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service; and (c) abortions in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians, or to deny such payments on behalf of any such indigent pregnant women for such abortions;

(2) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance

programs, that the abortions and medical procedures described in para. (1) are not, or will not be, a covered (reimbursable) service under the Illinois medical assistance programs.

The remainder of the permanent injunction of May 15, 1978 and the definitions contained therein remain in full force and effect with the exception of para. (d) [containing the definition of "therapeutic"] which is hereby deleted."

Respectfully submitted,

JASPER F. WILLIAMS, M.D.
EUGENE F. DIAMOND, M.D.
Intervening Defendants

By: /s/ DENNIS J. HORAN

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID M. ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc., et al.,

Defendants.

No. 77 C 4522

**AMENDED
NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Defendant, ARTHUR F. QUERN, Director, Illinois Department of Public Aid, by and through his attorney, WILLIAM J. SCOTT, Attorney General, State of Illinois, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1252 from the Memorandum Opinion dated April 29, 1979, the Final Judgment and Order dated April 30, 1979, and docketed May 2, 1979, granting partial summary judgment for the plaintiffs, in the United States District Court for the Northern District of Illinois, Eastern Division, by the Honorable John F. Grady.

Defendant prays that the Final Judgment and Permanent Injunction be reversed.

The parties to this Order and the names and addresses of their respective attorneys are:

1. Plaintiffs-appellees who are represented by Robert W. Bennett, Esquire, 357 East Chicago Avenue, Chicago, Illinois 60611.

2. Plaintiffs-appellees, Zbaraz and Motew, who are represented by David Goldberger, Esquire, and Lois Lipton, Esquire, Roger Baldwin Foundation of ACLU, Inc., 5 South Wabash Avenue, Chicago, Illinois 60603.

3. Plaintiffs-appellees, Doe and Chicago Welfare Rights Organization, who are represented by Aviva Futorian, Esquire, Robert E. Lehrer, Esquire, Wendy Meltzer, Esquire, and James D. Weill, Esquire, Legal Assistance Foundation of Chicago, 343 South Dearborn Street, Chicago, Illinois 60604.

4. Defendant-appellant, Arthur F. Quern, Director of the Illinois Department of Public Aid, who is represented by William J. Scott, Attorney General, State of Illinois, William A. Wenzel, Special Assistant Attorney General (Of Counsel), 130 North Franklin, Suite 300, Chicago, Illinois 60606.

5. Defendants-appellants intervenors, Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., who are represented by Patrick A. Trueman and John D. Gorby, Americans United for Life Legal Defense Fund, 230 North Michigan, Suite 515, Chicago, Illinois 60601.

6. Defendant-appellant intervenor, United States of America, which is represented by Jonathon Ginsburg, United States Department of Justice, Civil Division, 10th and Pennsylvania, N.W., Washington, D.C. 20530 and James Hynes, Assistant United States Attorney, 219 South Dearborn Street, Chicago, Illinois 60604.

Respectfully submitted,

/s/ **WILLIAM J. SCOTT**
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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

ARTHUR F. QUERN, etc., et al.,

Defendants.

Civil Action No.
77 C 4522

NOTICE OF APPEAL

Notice is hereby given that the federal defendant-intervenor appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from that portion of the Final Judgment and Order dated April 30, 1979, and docketed May 2, 1979, granting partial summary judgment to the plaintiffs, in the United States District Court for the Northern District of Illinois.

Dated at Chicago, Illinois, this 25th day of May, 1979.

Respectfully submitted,

/s/ BARBARA ALLEN BABCOCK/PB
BARBARA ALLEN BABCOCK
Assistant Attorney General

THOMAS P. SULLIVAN
United States Attorney

/s/ MARTIN B. LOWERY

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Supreme Court of the United States

Nos. 79-4, 79-5 and 79-491

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
Appellants,

v.

DAVID ZBARAZ, et al.;

ARTHUR F. QUERN, Director, Illinois Department
of Public Aid, et al.;

Appellants;

v.

DAVID ZBARAZ, et al.; and

UNITED STATES,

Appellant,

v.

DAVID ZBARAZ, et al.

APPEALS from the United States District Court for the
Northern District of Illinois.

The statements of jurisdiction in these cases having been
submitted and considered by the Court, further consideration of
the question of jurisdiction is postponed to the hearing of the
cases on the merits. The cases are consolidated and a total of
one and one half hours is allotted for oral argument.

November 26, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., et al.

Appellants

vs.

DAVID ZBAREZ, M.D., et al.

Appellees

No. 79-5

ARTHUR F. QUERN, Director, Illinois
Department of Public Aid, et al.

Appellants

vs.

DAVID ZBAREZ, M.D., et al.

Appellees

On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

MOTION TO APPOINT COUNSEL FOR
CHILDREN UNBORN AND BORN ALIVE

Alan Ernest
P.O. Box 2471
Washington, DC 20013
Counsel for Movant

MOTION FOR APPOINTMENT OF ALAN ERNEST AS
COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penalty.

The evidence shows that the hysterotomy is a common method of performing abortions under *Roe v Wade*. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins ch.13,s. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. *Rex v Senior*, 1 Moody CC 346(1832); *Reg. v Trilloe*, 174 Eng. Rep. 674(1842); *Reg. v West*, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of *Regina v West*, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of *Regina v West*, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. *Clarke v State*, 117 Ala 1(1898); *Hamilton v United States*, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., *Clarke v State*, 117 Ala. 1(1898); *State v Winthrop*, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited *Regina v West*, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, *A Treatise on the Law Homicide in the United States* 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, *Roe v Wade* permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question, - Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under *Roe v Wade*

A common way to perform abortions under *Roe v Wade* is by hysterotomy. See, e.g., *Commonwealth v. Edelin*, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . . Almost all were born alive." *Id.*, at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. *Ross v Oregon*, 227 US 150(1913). Consequently, if *Roe v Wade* is a mistake of law, then mass murder is being perpetrated in America. The *Roe v Wade* hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, *Comm. v Harmon*, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, *Clarke v State*, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, *People v Chavez*, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 *The Collected Works of Abraham Lincoln* 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 *Wharton's Criminal Law and Procedure*, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but...the lawmaker has determined to make men know and obey." Holmes, *The Common Law* 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then *Roe v Wade* is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

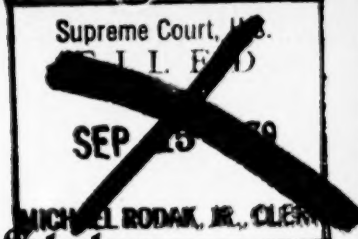
If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

MOTION FILED
SEP 15 1979

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[REDACTED]



IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., et al.

Appellants

vs.

DAVID ZBAREZ, M.D., et al.

Appellees

No. 79-5

ARTHUR F. QUERN, Director, Illinois
Department of Public Aid, et al.

Appellants

vs.

DAVID ZBAREZ, M.D., et al.

Appellees

On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF
AS AMICUS CURIAE BY THE LEGAL DEFENSE FUND
FOR UNBORN CHILDREN IN SUPPORT OF
THE APPELLANTS

Alan Ernest
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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN
CHILDREN IN SUPPORT OF THE RESPONDENT

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

INDEX

Brief by amicus curiae	1
Summary of Argument	1
Argument	2
PART I: Roe v Wade is Based on False Evidence	2
PART II: The Court's Procedures are Unconstitutional	7
PART III: The Case Against the Supreme Court	11
PART IV: The Supreme Court has Overthrown the United States Constitution	15
Conclusion	23

AUTHORITIES

Cases

Baxter v Palmigiano, 47 L Ed 2d 810	14
Dartmouth College v Woodward, 4 Wheat. 518	17
Marbury v Madison, 1 Cranch 137	13,22
Ogden v Sanders, 12 Wheat. 212	17
State v Moore, 25 Iowa 128	6
The Justice Case, 3 Trials of War Criminals before the Nuernberg Military Tribunals	19

Texts

Archbold, J.F., Archbold's Criminal Procedure, Pleading and Evidence(6th ed 1853)	6
Berger, R., Government by Judiciary: The Trans- formation of the Fourteenth Amendment(1977). .	20
Denman, T., M.D., An Introduction to the Practice of Midwifery (1802)	4
Hodge, H.L., M.D., The Principles and Practice of Obstetrics (1864)	4
Transactions of the American Medical Assn.	6

AMICUS CURIAE BRIEF

For the 4/ 5^t time, the Supreme Court is petitioned to overrule its 1973 abortion decision, Roe v Wade, 410 US 113. The grounds are set out below in the SUMMARY OF ARGUMENT.

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, *infra* pages 2-7.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, *infra* pages 8-11.

3. It is further alleged that many of the killings that the U.S. Supreme Court asserted to legalize in Roe v Wade are murder in the first degree. The evidence presented in the MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE, filed in this case, is incorporated herein by reference.

4. It is further alleged that the Roe v Wade killings violate federal and state positive criminal statutes. The U.S. Supreme Court is herein charged with crim-

inal falsehood and criminal extermination, including mass murder in the first degree. See PART III, infra pages 11-14.

5. It is alleged that the judges of the United States have combined to overthrow the Constitution of the United States and to establish a government by Judiciary, founded on fraud and murder. See PART IV, infra pages 15-22.

ARGUMENT

PART I

ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113, is based on false evidence and millions of lives have been unconstitutionally exterminated. The documentation to prove this charge has been repeatedly submitted to the Supreme Court.

This documentation was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v. John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

----- Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the

same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." *Roe v Wade*, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, *A Hundred Years of Medicine* 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., *An Introduction to the Practice of Midwifery* 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., *A Complete Treatise on Midwifery* 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., *The Principles and Practice of Obstetrics* 293(1864)(American phy-

sician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." *Roe v Wade*, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Roe v Wade*, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v Wade*, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment, "any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and

more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II

THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings are in such manifest conflict with due process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No. 78-427, cert. denied 58 L Ed 2d 324):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg

court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [The Justice Case infra p. 19, at 1046.]

"The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented.¹

1. In Planned Parenthood of Central

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to

Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 728 (5th ed 1978). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.

And the Supreme Court either refused permission to file amicus curiae briefs, or refused to fully and fairly hear amicus curiae briefs, which presented this new evidence, in Colautti v Franklin, 58 L Ed 2d 596; Bellotti v Baird, L Ed 2d ; Anders v. Floyd, 59 L Ed 2d 442; and Ashcroft v Freiman, affd 59 L Ed 2d 630.

2. The Supreme Court has repeatedly refused to allow counsel to represent children unborn or born alive in its judicial proceedings, and to defend their constitutionally protected right to life.

In Doe v Bolton, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing at 5. But the Court denied the request.

In Colautti v Franklin, 58 L Ed 596, the Court again extended the killings in the name of Roe v Wade, after refusing to allow counsel to represent the victims and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. Motion denied at 57 L Ed 2d 1131.

In Anders v Floyd, 59 L Ed 2d 442, the Court again refused to allow counsel to represent the victims, and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 59 L Ed 2d 442.

In Bellotti v Baird, L Ed 2d , the Court refused to allow counsel to represent the victims and present new evidence (See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE in this case) to show that the victims were being murdered. 59 L Ed 2d 451.

In Ashcroft v Freiman, 59 L Ed 2d 630, the Court affirmed an appeal after refusing to allow counsel to represent the victims and defend their constitutional right not to be murdered.

And the Supreme Court refused to allow counsel to represent the victims and defend their constitutional right not to be murdered in Baird v Sharp, cert. denied 60 L Ed 2d 1057, and Preterm v King, cert. denied 60 L Ed 2d 1057.

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

Thus, the Court has repeatedly heard and decided abortion cases, and struck down state abortion laws, and effectively extended the killing in the name of Roe v Wade, and refused to appoint counsel to represent the victims and present new evidence, never presented by the parties, to show that the victims are being exterminated in violation of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree.

It can not be pretended that it is any longer the government of the United States—any government of Constitution and laws—wherein judges presume to decree killing to be a constitutional right and refuse to even listen to the facts.

PART III THE CASE AGAINST THE SUPREME COURT

Counsel's 8th (Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77-1358), and each subsequent petition, specified the criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And counsel's 25th petition, and each subsequent petition, to overrule Roe v Wade presented the new evidence, adopted herein by reference, which shows many Roe v Wade killings to be murder in the first degree. The Justices who asserted to legalize those killings may now face the death penalty in very many states.

The Supreme Court has never attempted to show the new evidence to be wrong, much less to prove the charges to be false.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353 (1972). "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact..... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810, 822 (1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" And again, "I may assume that your silence gives consent." Apology in Plato 41, 45 (Jowett transl. Classics Club 1942). See also, 4 Wigmore, Evidence, §§ 1071-1072 (Chadbourn rev. 1972).

PART IV

THE SUPREME COURT HAS OVERTHROWN THE UNITED STATES CONSTITUTION

The evidence shows that the judges of the United States have combined to overthrow the United States Constitution, and to establish a government by Judiciary, founded on fraud and murder.

A.

It can not be contested that America was founded upon the principle that government derives its "just powers from the consent of the governed." This was adopted by the Continental Congress in the Declaration of Independence. While the Declaration may not be law in itself, it provides definitions by which the law is to be understood. Gulf, Colo. and S. Fe Ry v Ellis, 165 US 150, 159-160 (1896).

The first sentence of the U.S. Constitution sets out this mother principle of democracies: "All legislative powers herein granted shall be vested in a Congress of the United States." Congress is elected by the people at regular elections, and thus, its laws are derived from the consent of the governed.

The Constitution itself was adopted by the people in convention. The Constitution is thus derived from the consent of the gov-

erned. And Article V of the Constitution provides the means for amending the Constitution, which likewise makes amendments be derived from the consent of the governed.

B.

Under the U.S. Constitution's Article III, the federal judiciary is not elected by the people, and holds office during good behavior, in effect, for life.

The Constitution gives the judges no power to make laws. The lawmaking power, as admitted by the Supreme Court, is the power to make new rules for the future. *Ross v Oregon*, 227 US 150, 161 (1913).

While the judicial power does not admit to lawmaking, it has been decided that it does admit to determining the meaning of statutes, and the U.S. Constitution. *Marbury v Madison*, 1 Cranch 137(1803). But the Supreme Court has no power to make new laws under the guise of construction. *Pillsbury v United Engineering*, 342 US 197, 199.

The rules used by the courts to construe the meaning of the laws are founded in the principle that laws are derived from the consent of the governed. The purpose of construction is to determine the intent of the lawmaker.

Chief Justice John Marshall recognized this "consent of the governed" as the foundation of the rules that the courts must apply in construing the Constitution.

FIRST: The Constitution must be given the meaning "contemplated by its framers."

Ogden v Sanders, 12 Wheat. 212, 332(1827) (dissenting opinion).

SECOND: "(I)n no doubtful case would it pronounce a legislative act to be contrary to constitution." *Dartmouth College v Woodward*, 4 Wheat. 518, 625(1819).

The foundation under these two rules is too compelling to admit any doubt as to the truth of the two rules.

Since the legitimacy of the Constitution is derived from the consent of the governed, any true construction must give the Constitution the meaning intended by the people who framed and adopted it. The central question is: To what have the people consented. Any policy of construction that disregards the consent of the governed can not be lawful. And to what the people have consented is susceptible to proof by evidence which can be independently verified. Thus the security of a written Constitution.

The second rule is a necessary corollary of the first. The right of the people to govern themselves being so paramount, it takes careful and clear evidence to warrant a conclusion that, in the U.S. Constitution, the people intended to withdraw from themselves the power to make their own laws on that subject. If, after review of the words of the Constitution, and the historical evidence concerning the meaning of those words, a reasonable doubt remains as to whether the makers of the Constitution intended to prohibit such a law, then

the law must stand as valid. The opinions of unelected officials holding office for life are not to be substituted for the judgments of the peoples' elected representatives unless the conflict between the law and the Constitution is clear.

The decisions of Chief Justice John Marshall are submitted as a faithful execution of these two principles of construction.

C.

In his Farewell Address, Washington warned that the customary means of overthrowing constitutions was by usurpation:

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. 35 The Writings of George Washington 229(Fitzpatrick ed. 1949).

D.

The world does not want for examples of democratic constitutions overthrown by the process of usurpation.

Prior to World War II, the German Constitution was thought to be a model of democracy and freedom, "the most liberal and democratic document of its kind the twentieth century had seen," which declared "Political power emanates from the people." W.L. Shirer, The Rise and Fall of the Third Reich

88-89(Fawcett Crest paperback 1969). Hitler came to power "within the terms of the constitution." Id., at 255.

Thereafter, by usurpation, Hitler became the "supreme judge" of Germany. The Justice Case, 3 Trials of War Criminals before the Nuernberg Military Tribunals 1011 (1951). The decrees of this "supreme judge" were obeyed as law. The "supreme judge" presumed to decree murder to be lawful. And this "supreme judge" was unquestioningly obeyed by the Nazi judges.

At Nuremberg, the Nazi judges claimed the defense that they could not be held accountable for their crimes against humanity, including "extermination," because they were bound by the "decrees" of the "supreme judge" of Germany. The Justice Case, supra, 983-85, 1010-1014. The Nuremberg court rejected that defense with the observation, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, supra, at 985.

Never formally repealed, the Constitution was overthrown by usurpation.

E.

The evidence shows that the judiciary of the United States has set upon a course of usurpation astonishingly similar to that traveled by the Nazi judicial system.

The judges of the United States came to power within the terms of the Constitution. The evidence shows that the judges routinely, as a matter of policy, defy the consent

of the governed, and effectively assert their will to be law. See, R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment(1977). This book sets out evidence to show that the Supreme Court has generally construed the Fourteenth Amendment in defiance of the intent of its framers. Berger concludes, "Such conduct impels one to conclude that the Justices are become a law unto themselves." Id., at 408.

The evidence shows that the Supreme Court uses false evidence to defy the intent of the framers. Supra, PART I.

The evidence shows that the Supreme Court has presumed to decree murder to be a constitutional right.. See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE incorporated herein by reference.

The evidence shows that when it comes to constitutional questions, truth has nothing to do with the federal courts: the will of the judge has become the law.

The evidence, supra pages 7-11, shows that the Supreme Court , in broad form, has used the same procedures to effect and maintain the Roe v Wade killings as the Nazi judges used to condemn their victims:

In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. The Justice Case, supra, 1046.

The evidence shows that, through Roe v

Wade, the Supreme Court has effectively asserted a second method for the government to condemn persons to death.

The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right of representation of counsel; and right to confront the accusing evidence and cross-examine it; and right to present evidence on behalf of the accused; and right to be acquitted unless found guilty beyond a reasonable doubt; and provision to stop execution if new evidence is discovered.

The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims) to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution.

The evidence, supra, shows that the Supreme Court decreed murder to be a constitutional right, and there does not appear to be any defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany so the Supreme Court is to America.

The evidence shows that the Supreme Court is being unquestioningly obeyed by the federal judiciary. See counsel's 34th & 35th petitions to overrule Roe v Wade, Unborn Child Roe v. United States Court of Appeals for the District of Columbia Circuit, No. 79-166; and Unborn Child Roe v.

John J. Sirica, Judge, United States District Court for the District of Columbia, No. 79-188. Those courts have effectively ruled that they were bound by Roe v Wade regardless of any claim that it was wrongly decided. The federal judiciary is willing to enforce, permit, and omit to stop killings that violate the express terms of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree, without asking even a single question, much less demanding any answers.

The evidence shows that in the courts of the United States, the will of the judge has replaced the consent of the governed as the basis of law. By any definition, this is the overthrow of the United States Constitution.

If it be true, as Chief Justice John Marshall once held in Marbury v Madison, 1 Cranch 137, 163, 176, 178, that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of political institutions.

Furthermore, the Declaration of Independence is perverted by the judges to effectively read that "all Men are created equal, - except those created to die for the convenience of others."

CONCLUSION

If it be true, as Jefferson once wrote, that America is an "experiment" to establish that "man may be governed by reason and truth," and that "truth and reason will eternally prevail, however in times and places they may be overborne for a while by violence," then the facts showing the consent of the governed will ultimately prevail.

And Chief Justice John Marshall held, for federal judges to "swear" to discharge their duties "agreeably to the constitution," and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavors to preserve," is worse than "solemn mockery," it is a "crime." Marbury v Madison, supra, 179-180. The criminal law will not permit the "dagger of the assassin" to be "concealed beneath the robe of the jurist."

If the United States were being ruled over by a Tribunal of murderers holding office for life, and being blindly obeyed by all federal judges who violate the express words of the Constitution and positive criminal statutes, including mass murder in the first degree, without question, then surely it would be a fraud without parallel in the legal history of the world, and tantamount to the overthrow of the Constitution of the United States.

Alan Ernest
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OCT 29 1979

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D.,

Appellants,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-5

JEFFREY MILLER, Acting Director, Illinois Department of Public Aid,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-491

UNITED STATES OF AMERICA,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

**MOTION TO VACATE IN PART,
TO DISMISS IN PART, AND TO AFFIRM**

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	4
STATEMENT OF THE CASE	4
QUESTIONS PRESENTED	5
ARGUMENT	6
I.	
That Part of the District Court Judgment Ruling on the Hyde Amendment Should Be Vacated, as There is no Case or Controversy with Respect to That Provision	6
II.	
The Judgment of the District Court Should Other- wise Be Affirmed, on the Ground That the Ques- tions Presented Are so Unsubstantial as Not to Need Further Argument	9
III	
This Court is Without Jurisdiction over the In- tervenors' Appeal insofar as it Seeks Review of the Earlier Court of Appeals' Decision Herein	25
IV	
The Social Security Act and Implementing Federal Regulations Require Illinois to Cover all Medically Necessary Abortions under its Medicaid Program ..	33
CONCLUSION	34
APPENDIX:	
A—Doe v. Poelker, No. 73C 565 (A) (E.D. Mo. Dec. 17, 1974)	1a
B—Illinois Department of Public Aid Program Rules	8a

CITATIONS

Cases

Art Theater Guild, Inc. v. Ohio ex rel. Schoen, 421 U.S. 957 (1975)	28
Beal v. Doe, 432 U.S. 438 (1977)	9, 13, 18, 21
Brown v. Alton Water Co., 222 U.S. 325 (1912)	30, 31, 32
Califano v. Goldfarb, 430 U.S. 199 (1977)	17
Califano v. Webster, 430 U.S. 313 (1977)	22
Colautti v. Franklin, 439 U.S. 379 (1979)	9, 14, 22
Craig v. Boren, 429 U.S. 190 (1976)	12
Dandridge v. Williams, 397 U.S. 471 (1970)	17
Doe v. Bolton, 410 U.S. 179 (1973)	9, 13
Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975)	15
Doe v. Poelker, No. 73C 565 (A) (E.D. Mo. December 17, 1974)	15, App. A
Dunn v. Blumstein, 405 U.S. 330 (1972)	24
El Paso v. Simmons, 379 U.S. 497 (1965)	28
Farmers & Mechanics National Bank v. Wilkinson, 266 U.S. 503 (1925)	9, 30, 31, 32
Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 515 (1957)	28
Fusari v. Steinberg, 419 U.S. 379 (1975)	8, 29
Gabriel v. United States, 429 U.S. 877 (1976)	27
Gallogly v. Larsen, 420 U.S. 904 (1975)	8
Goldberg v. Kelly, 397 U.S. 254 (1970)	16
Golden v. Zwickler, 394 U.S. 103 (1969)	7
Kantrowitz v. Weinberger, 388 F.Supp. 1127 (D.D.C. 1974), aff'd, 530 F.2d 1034 (D.C. Cir. 1976), cert. denied, 429 U.S. 819 (1976)	19
Legion v. Richardson, 354 F.Supp. 456 (S.D.N.Y. 1973), aff'd sub nom. Legion v. Weinberger, 414 U.S. 1058 (1973)	19
Liverpool N.Y. & P.S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885)	7
Maher v. Roe, 432 U.S. 464 (1977) ..	15, 16, 18, 19, 21, 22, 23

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941)	7
McLucas v. DeChamplain, 421 U.S. 21 (1975)	29
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	22, 23, 24, 25
Neale v. Hayduk, 420 U.S. 915 (1975)	28
Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916)	29
Palmore v. United States, 411 U.S. 389 (1973)	28
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	13, 14
Poelker v. Doe, 432 U.S. 519 (1977)	15, 16
Preiser v. Newkirk, 422 U.S. 395 (1975)	8
Richardson v. Blumenthal, 435 U.S. 939 (1978)	28
Roe v. Wade, 410 U.S. 113 (1973)	11, 12, 14, 21, 22, 24
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	11, 16, 22
Shapiro v. Thompson, 394 U.S. 618 (1969) ..	16, 22, 23, 24, 25
Singleton v. Wulff, 428 U.S. 106 (1976)	14, 25
Turner v. Department of Employment Security, 423 U.S. 44 (1975)	22
Union Trust Co. v. Westhus, 228 U.S. 519 (1913) ..	30, 31, 32
United Public Workers of America v. Mitchell, 330 U.S. 75 (1946)	9
United States v. American Friends Service Committee, 419 U.S. 7 (1974)	30
United States v. Munsingwear, Inc., 340 U.S. 36 (1950)	8, 33
United States v. Naponiello, 267 U.S. 577 (1925)	32
United States v. Raines, 362 U.S. 17 (1960)	7, 8, 9, 29
United States v. Robinson, 361 U.S. 220 (1960)	27
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	17, 21
Weinberger v. Weisenfeld, 420 U.S. 636 (1975)	17
Westcott v. Califano, 99 S.Ct. 2655 (1979)	16
Williams v. Zbaraz, 99 S.Ct. 2095 (1979)	18, 33

Williams v. Zbaraz, 99 S.Ct. 2833 (1979)	33
Zablocki v. Redhail, 434 U.S. 374 (1978)	12, 22
Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979)	2, 3, 5, 6, 8, 10, 20, 25, 29
Zbaraz v. Quern, No. 77 C 4522 (N.D. Ill. April 30, 1979)	2, 7, 9, 26
Zbaraz v. Quern, 469 F.Supp. 1212 (N.D. Ill. 1979) ..	3, 6, 8, 10, 11, 12, 15, 17, 22

*Constitution, Statutes, Regulations
and Other Authorities*

U.S. CONST. art. III, §2	7, 8
U.S. CONST. amend. V	8
U.S. CONST. amend. XIV, §1	5, 8, 9, 23
28 U.S.C. §1252 (1976)	2, 3, 5, 9, 26, 27, 28, 29, 30, 32
28 U.S.C. §1254 (1976)	28, 32
28 U.S.C. §1257 (1976)	28
28 U.S.C. §2101 (1976)	26, 27, 29, 30
28 U.S.C. §2103 (1976)	28
28 U.S.C. §2284 (1976)	31
42 U.S.C. §§1396 <i>et seq.</i> (1976 & Supp. I 1977)	2, 5, 20, 25, 33, 34
Labor—HEW Appropriations Act, 1979, Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978) (current version at Pub. L. No. 96-86, §118 (Oct. 12, 1979))	2, 5, 6, 7, 8, 10, 20, 25, 30, 34
Act of Feb. 13, 1925, ch. 229, 43 Stat. 938	31
S.Ct.R. 10	26, 27, 28
S.Ct.R. 11	26, 27, 28
S.Ct.R. 16	2
S.Ct.R. 35	2
S.Ct.R. 48(3)	1
FED. R. CIV. P. 60(b)(5), (6)	30
ILL. REV. STAT. ch. 23, §§5-1, 6-1, 7-1	20
Ill. Dep't of Public Aid Program Rules	20, App. B
S.Rep. No. 404, 89th Cong., 1st Sess. (1965)	19

In The

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October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D.,

Appellants,

v.

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Appellees.

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JEFFREY MILLER, Acting Director, Illinois Department of Public Aid,*

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DAVID ZBARAZ, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO VACATE IN PART, TO DISMISS IN PART, AND TO AFFIRM

* Jeffrey Miller has recently succeeded Arthur F. Quern as Director of the Illinois Department of Public Aid. Under Supreme Court Rule 48(3), he is automatically substituted for Mr. Quern as one of the appellants here. Because the jurisdictional statements of all the appellants refer to the state appellant as being Mr. Quern, however, appellees shall also do so.

Appellees David Zbaraz, Martin Motew and Jane Doe, on their behalf and on behalf of all others similarly situated, and the Chicago Welfare Rights Organization, pursuant to Supreme Court Rules 16 and 35, respectfully move that:

I. Paragraphs 4(a)(ii) and 4(b)(ii), and the second sentence of Paragraph 5 of the Final Judgment and Order of the United States District Court for the Northern District of Illinois (which grant relief with respect to Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978), the "Hyde Amendment"), be vacated, on the ground that no case or controversy is presented as to the constitutionality of that provision; and

II. The judgment and order of the District Court be otherwise affirmed in its constitutional holdings, on the ground that the questions presented are so unsubstantial as not to require further argument; and

III. The appeal of intervenors Williams and Diamond (the "intervenors"), insofar as it seeks review of the previous decision of the Court of Appeals, 596 F.2d 196 (7th Cir. 1979), with regard to the requirements of Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, be

- A. dismissed, on the ground that the intervenors have never taken a timely appeal from that decision, and even if a timely appeal has been taken, 28 U.S.C. § 1252 does not confer jurisdiction to review it; or
- B. if the relief sought in subparagraph III.A is denied, affirmed, on the ground that the question presented is so unsubstantial as not to require further argument.

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are designated in the Jurisdictional Statement of the United States, filed September 21, 1979, and in appellees' Conditional Petition for a Writ of Certiorari, No. 79-64 (the "Petition for Certiorari"), filed July 13, 1979, to review a previous Court of Appeals decision herein. The April 29, 1979, Memorandum Opinion of the District Court, previously cited as unreported, has now been reported at 469 F.Supp. 1212 (N.D. Ill. 1979).

JURISDICTION

The jurisdictional requirements are adequately set forth in the Jurisdictional Statement of the United States, insofar as appellants seek review of the judgment of the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1252. Insofar as the intervenors* seek review of the previous decision of the Court of Appeals, 596 F.2d 196 (7th Cir. 1979), this Court is without jurisdiction of that appeal, under 28 U.S.C. § 1252 or otherwise. See pp. 25-33 *infra*.

* While the United States technically intervened in this case, it will be referred to throughout as the "United States." Only defendants Williams and Diamond will be referred to as the "intervenors."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Jurisdictional Statement of appellant Quern sets forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Appellees' Petition for Certiorari to review the decision of the Court of Appeals sets forth the Statement of the Case for this Motion as well.

QUESTIONS PRESENTED

1. When plaintiffs-appellees have never challenged Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (the "Hyde Amendment"), on constitutional or other grounds, and a ruling on the issue is not necessary to give them full relief, is there an absence of an article III case or controversy as to the constitutionality of that provision, so that the part of the District Court judgment granting relief with respect to it should be vacated?

2. Does Illinois' restrictive abortion funding policy, which denies coverage of almost all medically necessary abortions under otherwise comprehensive state medical assistance programs, violate the equal protection clause of the fourteenth amendment to the United States Constitution?

3. Does 28 U.S.C. § 1252 confer upon this Court jurisdiction over the intervenors' appeal, insofar as it seeks review of the Court of Appeals' earlier decision herein, 596 F.2d 196 (7th Cir. 1979)?

4. Does Illinois' restrictive abortion funding policy, which denies coverage of almost all medically necessary abortions under state medical assistance programs, violate Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*?*

* If this Court resolves Question 3 in the negative, it will have no occasion to reach this question, which is presented only by the intervenors' appeal from the Court of Appeals' decision.

ARGUMENT

I.

THAT PART OF THE DISTRICT COURT JUDGMENT RULING ON THE HYDE AMENDMENT SHOULD BE VACATED, AS THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO THAT PROVISION.

Plaintiffs-appellees have never challenged the constitutionality of the Hyde Amendment in this litigation, or sought relief with respect to it or against any federal official.* *Zbaraz v. Quern*, 596 F.2d 196, 197 (1979); R. 133.** Transcript of April 30, 1979, hearing, 16-17; see Petition for Certiorari, 7-9, 25. The District Court recognized that plaintiffs were "attack[ing] only the legality of an Illinois statute." Memorandum Opinion, reprinted in U.S. Jurisdictional Statement, at 5a, n.3. It nonetheless passed upon the constitutionality of the Hyde Amendment because it reasonably read the Court of Appeals' decision as having required it to do so. *Id.* See *Zbaraz v. Quern*, 596 F.2d at 202.

One of the grounds appellees have advanced for granting their Petition for Certiorari is that the Court of

* Congress has enacted a new version of the Hyde Amendment: Pub. L. No. 96-86, § 118 (October 12, 1979). The new version is identical to that for FY 1979, except that it eliminates that part of the previous law providing federal funds for abortions "in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." This new, interim appropriations act expires on November 20, 1979.

** The record in this case was certified to the Clerk of the Court on June 20, 1979. Portions of the record cited herein will be designated by "R." followed by the number of the item in the record.

Appeals erred in directing the District Court to consider on remand the constitutionality of the Hyde Amendment. Petition for Certiorari, 25-26. Appellees have argued that the article III case or controversy predicate for the Court of Appeals' decision in this respect was absent, for they had never even challenged the constitutionality of the Hyde Amendment, relief against the restrictive Illinois abortion funding policy being sufficient to grant them the full relief they sought. *Id.*

On this appeal, this error should be dealt with by vacating the portion of the District Court's decision granting relief with respect to the Hyde Amendment, viz: ¶s 4(a)(ii), 4(b)(ii), and the second sentence of ¶5 thereof. The existence of an article III case or controversy as to the constitutionality of the Hyde Amendment requires that there be a "substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [appropriate relief]." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941). But here not only is there no "substantial controversy" between the parties as to the Hyde Amendment, there is no controversy at all. Similarly, "[t]his Court . . . has no jurisdiction [to pass upon the constitutionality of a federal statute] except as it is called upon to adjudge the legal rights of litigants in actual controversies." *United States v. Raines*, 362 U.S. 17, 21 (1960), quoting *Liverpool N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). In the exercise of that jurisdiction, it has insisted that it will "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.* Appellees have sought coverage within the Illinois medical assistance programs for all medically necessary abortions. Granting them relief against the Hyde

Amendment secures only federal reimbursement to Illinois for such abortions; it does not change the scope of the Illinois program. See *Petition for Certiorari*, 25. There is thus no necessity to pass upon the constitutionality of that federal statute.*

The "established practice" of this Court in dealing with a civil case from a lower federal court presenting issues as to which there is no article III case or controversy, because they have become moot or otherwise, is to reverse or vacate the lower court judgment as to those issues. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *Gallooly v. Larsen*, 420 U.S. 904 (1975); *United States v. Raines*, 362 U.S. 17, 20-28 (1960);** see *United*

* *Raines* also announced a related constraint: "never to formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, 362 U.S. 17, 21 (1960). This rule may independently command the same result. The Court of Appeals apparently viewed the question of the constitutionality of the Hyde Amendment under the fifth amendment as indistinguishable from the question of whether the restrictive Illinois abortion funding policy was constitutional under the fourteenth amendment, see *Zbaraz v. Quern*, 596 F.2d 196, 203 & n.22 (1979), thus suggesting that the constitutional rule governing disposition of the latter question would be the same, and no broader, than that governing the former. But as the District Court suggested, the two questions might well be different, U.S. Jurisdictional Statement, at 5a, n.3, so that the constitutionality of the Illinois policy might not be determinative of the constitutionality of the Hyde Amendment. While appellees take no position here with respect to the constitutionality of the Hyde Amendment, the analyses of the constitutionality of that provision and of the Illinois policy are not perforce identical; and this Court should not reach out to decide the Hyde Amendment question, even if an article III case or controversy as to it were present. Cf. *Fusari v. Steinberg*, 419 U.S. 379 (1975).

** When there is no case or controversy as to the entire case, of course, this Court remands with directions to dismiss the complaint. E.g., *Preiser v. Newkirk*. But when remaining

(Footnote continued on following page)

Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1946).

II.

THE JUDGMENT OF THE DISTRICT COURT SHOULD OTHERWISE BE AFFIRMED, ON THE GROUND THAT THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The central question presented is whether Illinois may, consistent with its obligations under the fourteenth amendment, withdraw funding for most medically necessary abortions,* while continuing to fund es-

footnote continued

issues are sufficient to make the case justiciable, the Court retains jurisdiction to pass upon them, even where the issues deemed not justiciable are the ones upon which this Court's jurisdiction was originally invoked. *United States v. Raines*, 362 U.S. at 27-28 (appeal under 28 U.S.C. § 1252); cf. *Farmers & Mechanics Nat'l Bank v. Wilkinson*, 266 U.S. 503, 506 (1925). So here, if this Court vacates the District Court Hyde Amendment ruling, it still retains jurisdiction to pass upon the question of whether Illinois' restrictive abortion funding policy is constitutional, as to which there is very much a live controversy.

* The Final Judgment and Order that is the subject of this appeal defines a "medically necessary abortion" as:

an abortion which is necessary for the preservation of the life or the physical or mental health of a woman seeking such treatment, in the professional judgment of a licensed physician in Illinois, exercised in light of all factors relevant to her health.

Final Judgment and Order, ¶2(d) (reprinted in U.S. Jurisdictional Statement, at 24a). That definition was adopted from *Doe v. Bolton*, 410 U.S. 179, 192 (1973). See also *Colautti v. Franklin*, 439 U.S. 379, 387-88 (1979); *Beal v. Doe*, 432 U.S. 438, 441 n.3 (1977).

The record below shows that abortions covered under the "medically necessary" standard constitute between 20% and 50% of all state-funded abortions performed in Illinois prior to

(Footnote continued on following page)

entially all other medically necessary procedures under comprehensive medical assistance programs. The Court of Appeals summarized three respects in which Illinois' restrictive abortion funding policy discriminates against those whose medical needs consist of medically necessary abortions:

The constraints [Illinois] impose[s] . . . on medically necessary abortions which are not imposed on other kinds of medically necessary care include (1) [a requirement of] a greater degree of potential harm from withholding treatment (the threatened damage in the case of an abortion must be "severe and long-lasting"), (2) the threatened harm must be physical, and (3) two doctors must make the determination of likely harm. 596 F.2d 196, 202 n.18 (7th Cir. 1979).*

On remand, the District Court found, on the basis of a record that is unequivocal on the matter, that the Illinois discrimination subjects a pregnant woman "to considerable risk of severe medical problems, which may even result in her death," U.S. Jurisdictional Statement, at 17a, and that "the effect of the [Illinois] criteria . . . will be to increase substantially maternal morbidity and mortality among indigent pregnant

footnote continued

the imposition of restrictions on state abortion coverage. Memorandum Opinion, reprinted in U.S. Jurisdictional Statement, at 21a; R. 101: Exh. C, Depp Affidavit, ¶11; R. 100: Plaintiffs' Memorandum, 13n.1 and Exhibits cited therein. Abortions federally reimbursed under the Hyde Amendment standard constitute approximately 1.3% of all such abortions. *Id.* at 9n.2 and Exhibits cited therein.

* The Court of Appeals was specifically referring to the constraints imposed by the Hyde Amendment. But since the restrictive Illinois abortion funding policy mirrors the Hyde Amendment standards, the characterization is also applicable to that policy.

women."* *Id.* On the basis of these findings the Court held that the Illinois discrimination was not rationally related to any "legitimate, articulated state purpose. . . ." U.S. Jurisdictional Statement, at 9a (citing *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973)). The court specifically found no legitimate state "interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women." U.S. Jurisdictional Statement, at 18a.**

* Appellants obviously find themselves embarrassed by these findings. Having no basis—much less any in the record—on which to call them into question, however, appellants proceed as if such findings can be ignored. Appellant Quern thus refers without supporting reference to "some small degree of medical risk" and to "minimal . . . [e]ffect [on] pregnant indigent women." Quern Jurisdictional Statement, 19. The intervenors make the unsupported statement that "it is an undisputed fact that forms of medical treatment other than abortion exist to treat health problems in pregnancy. . . ." Intervenors' Jurisdictional Statement, 19n.2. It is unclear what the "fact" here asserted really is. The only sense in which the "fact" would be "undisputed," however, is the trivial and irrelevant one that *some* conditions for which abortion was medically indicated might be treated or dealt with less effectively by other means. If the alternative procedure were less risky than abortion, abortion would not be medically necessary to treat the condition. See, e.g., R. 101: Exh. C, Depp Affidavit, ¶14 & *passim*. Appellants' only attempt to support an assertion of little danger to health from withholding medically necessary abortions is the intervenors' reference to a report of the Center for Disease Control. Intervenors' Jurisdictional Statement, 20. The report actually supports the District Court's findings. See Appellees' Memorandum in Opposition to Appellants' Applications for Stay, filed in this Court May 18, 1979, at 16-17. But it deals mainly with a matter beside the point: health problems resulting from the performance of abortions, not, as here, those resulting from poor women being unable to secure medically necessary abortions.

** The District Court was, of course, only following this Court's definitive balance of interests in *Roe v. Wade*, 410 U.S. (Footnote continued on following page)

The District Court's analysis emerges naturally from this Court's abortion decisions. Starting with *Roe v. Wade*, 410 U.S. 113 (1973), this Court has consistently held that no state interest in the abortion decision is sufficient to justify placing the pregnant woman's life or health in serious jeopardy. *Wade*, of course, divided pregnancy into three periods for purposes of legal analysis; the balance it struck in favor of women's privacy during the first two of those periods—before viability of the fetus—was grounded in the strict judicial scrutiny made appropriate by the fundamentality of the right of privacy in abortion decisions. For the period after viability, however, *Wade* acknowledged that the state could assert a compelling interest in the potential life of the fetus to justify regulation under the strict version of equal protection scrutiny. Even in the face of a compelling state interest, however, *Wade* insisted that the state could not prevent abortion "when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-164 (emphasis added). If a compelling state interest could not justify state action endangering

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113 (1973). See pp. 12-13 *infra*. What this Court had found impermissible, the District Court characterized as illegitimate. The intervenors object to the District Court's terminology (Intervenors' Jurisdictional Statement, 20n.3), but whatever form of words is used, it is clear that the District Court's holding was that Illinois' reckless unconcern with actual maternal life and health is an irrational way to serve any legitimate interest that might be involved. Thus the District Court said that "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate." U.S. Jurisdictional Statement, at 20a. In similar fashion this Court found in *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978), that a Wisconsin law had adopted irrational means to pursue interests this Court acknowledged were "legitimate and substantial." See also *Craig v. Boren*, 429 U.S. 190 (1976).

a woman's health, it follows *a fortiori* that the weaker pre-viability, un compelling state interest that is exclusively involved here cannot do so.

In *Doe v. Bolton*, 410 U.S. 179 (1973), *Wade's* companion case, this Court struck down several Georgia abortion regulations, repeatedly emphasizing the "patient's [medical] needs and . . . the physician's right to practice." 410 U.S. at 199 & *passim*. Indeed, *Bolton* explicitly struck down a two-doctor approval requirement, similar to the one imposed here, on the ground of its failure to satisfy the rational relationship test.* The Court held that the requirement had "no rational connection with a patient's needs and unduly infring[ed] on the physician's right to practice." 410 U.S. at 199.**

Similar solicitude for the health of the pregnant woman, and for the physician's role in protecting it, is the most persistent theme running through this Court's abortion decisions. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), a Missouri statute prohibited the use of saline amniocentesis as an

* Given the importance of moving quickly in abortion decisions, *Doe v. Bolton*, 410 U.S. 179, 198 (1973), the extra factor present here and not in *Bolton*—that the woman patient is threatened, perhaps imminently, with health damage from the pregnancy—makes the Illinois two-doctor requirement far more of an impediment to preserving a woman's health than was the Georgia statute. See R. 101: Exh. C, Depp Affidavit, ¶9; R. 101: Exh. E, Zbaraz Affidavit, ¶16.

** The *Bolton* court also stressed that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." 410 U.S. at 192. This is the definition of medical necessity adopted by the District Court. It was announced in *Bolton*, and reiterated in *Beal v. Doe*, 432 U.S. 438, 441n.3 (1977), to allow "the attending physician the room he needs to make his best medical judgment." 410 U.S. at 192.

abortion technique after the first twelve weeks of pregnancy. This was no absolute prohibition of abortion, for alternative abortion techniques remained permissible. This Court, however, looked behind purported legislative findings of fact and concluded that Missouri's prohibition of the saline method "as a practical matter . . . forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 79. For this reason:

[T]he outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge. *Id.**

See also *Singleton v. Wulff*, 428 U.S. 106 (1976).

Colautti v. Franklin, 439 U.S. 379 (1979), returned to the same theme, striking down a Pennsylvania attempt to constrain the doctor's determination of viability of a fetus and the abortion techniques he might employ. The Court reiterated the *Bolton* standard of medical necessity, *id.* at 393-94, and reemphasized the place in the *Roe v. Wade* balance of the health of the pregnant woman. A state may not prohibit or even "regulate" abortion where abortion is "necessary, in appropriate medical judgment,

* The actual purpose of the Illinois policy is easier to bring into focus than was Missouri's. The Illinois policy was espoused in the legislative debates, because "It does not prohibit anybody from having an abortion. It prohibits the people on welfare from having an abortion." R. 26: Addendum K-14 to Plaintiffs' Brief, Remarks of Rep. Bradley. This purpose of preventing abortion is, of course, just as constitutionally impermissible here as it was in *Danforth*.

to preserve the life or health of the pregnant woman." 439 U.S. at 386-87.

To rebut this analysis, appellants throughout this litigation have relied almost exclusively on this Court's 1977 decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977). What they consistently ignore, however, is that the health considerations that were central to the District Court's analysis and to this Court's decisions reviewed above, were missing entirely from *Maher* and *Poelker*.* Once this simple fact is acknowledged, *Maher* and *Poelker* cannot be read to denigrate the constitutional significance of preserving the health of pregnant women

* *Maher* is the principal case, and it characterizes the abortions under discussion as "non-therapeutic" or "elective" no fewer than ten times. The same distinction between medically necessary and medically unnecessary abortion is made explicit for purposes of the statutory question addressed in the companion case of *Beal v. Doe*, 432 U.S. 438 (1977). The third abortion decision handed down that day, *Poelker v. Doe*, 432 U.S. 519 (1977), is marginally more ambiguous, not in anything said in the brief *per curiam* opinion, but because the lower court had noted that the woman plaintiff there did have some medical problems. *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). It is clear, however, that these medical problems were irrelevant to the legal issue as framed by the plaintiffs and by the district court. Thus the district court's unreported decision, p. 1a, *infra*, repeatedly characterizes the policy in issue as one that denied abortion "except for medical reasons." See pp. 1a, 2a, 3a, 7a, *infra*. This Court meticulously avoided joining any factual dispute about the medical necessity of an abortion for the *Poelker* plaintiff. 432 U.S. at 520n.1. Instead, it explicitly characterized the issue in the case as involving "nontherapeutic" or "elective" abortion, and deliberately identified the *Poelker* issue with the one elaborately explored in *Maher*. *Poelker v. Doe*, 432 U.S. at 519, 520, 521. As the District Court concluded below, this Court in *Poelker* "could not have intended . . . to obliterate the distinction it had carefully drawn in *Maher* between medically necessary and non-therapeutic abortions." U.S. Jurisdictional Statement, at 16a, n.9.

requiring abortions. *Maher* indeed reaffirmed the primacy of considering the woman's health. 432 U.S. at 472.

Appellants make extravagant claims in the name of *Maher* and *Poelker*. Appellant Quern finds in those cases a principle of "fiscal autonomy." Quern Jurisdictional Statement, 18. The intervenors cite them for a "principle of democratic consensus." Intervenors' Jurisdictional Statement, 16. Each of these slogans amounts to a claim that courts will not review decisions in social welfare programs, no matter how irrational or how unrelated they are to pursuit of legitimate state interests. If adopted, this approach would resurrect the discredited distinction between "rights" and "privileges," repudiation of which was repeated only last term in *Westcott v. Califano*, 99 S.Ct. 2655 (1979). See also *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Maher and *Poelker* support no such scuttling of established constitutional law. *Maher*, indeed, explicitly repudiates it: "[W]hen a state decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." 432 U.S. 464, 469-70 (1977).^{*} And *Maher* goes on to quote the equal protection standards announced in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973)—itself a case involving public funding: legislation "must . . . be examined to determine whether it rationally furthers some legitimate articulated state purpose and therefore does not con-

^{*} The United States omits this essential qualification, and thus provides a quotation from *Maher* that is quite misleading. U.S. Jurisdictional Statement, 12.

stitute an invidious discrimination. . . ." See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

This is not to deny that courts often accord substantial deference to state allocative decisions in social welfare programs, in the absence of some strong countervailing consideration such as the health of pregnant women in jeopardy here. See *Dandridge v. Williams*, 397 U.S. 471 (1970). There are, however, two further distinctions between this case and most welfare cases. First, this case involves not only medical necessity but also a woman's right to privacy in the abortion decision, making heightened judicial scrutiny appropriate. This point will be developed further below. See pp. 22-25 *infra*. Second, state welfare classifications are usually employed for the purpose of allocating limited funds among various groups of recipients. In such cases this Court cannot forbid the disfavoring of one group without placing the benefits of another group in jeopardy. The Court expressed this concern in *Dandridge* by saying:

[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating *limited* public welfare funds among the myriad of potential recipients. 397 U.S. at 487 (emphasis added).

Illinois' refusal to fund medically necessary abortions, however, costs the state a great deal of money, thus diminishing the benefits available for all groups of recipients. As the District Court found, and state officials have effectively conceded, "the costs of pre-natal care, childbirth and postpartum care are substantially higher than the cost of abortions. . . . [I]f the newborn child then receives public aid, the cost differential is

even greater.”* U.S. Jurisdictional Statement, at 14a. When this Court finds such a classification unconstitutional, it is faced with no allocative dilemma such as the one that concerned the *Dandridge* Court.

Appellants’ misreading of *Maier* is profound indeed. For equal protection purposes, the essential distinction between this case and *Maier* is that in *Maier* there was no relevant discrimination. Connecticut had no program for funding any non-medically required procedures. Elective abortions were treated just like other elective medical procedures (*e.g.*, cosmetic surgery)—given neither public help nor hindrance. Similarly situated persons (*i.e.*, those with no medical need) received no care. There was thus, as a threshold matter, no discrimination in the exclusion of a “particular medically unnecessary procedure—nontherapeutic abortions.” *Beal v. Doe*, 432 U.S. 438, 446 n.11 (1977).

* Appellant Quern does not quarrel with this finding. Quern Jurisdictional Statement, 13. The intervenors do assert, however, Jurisdictional Statement, 17, as they repeatedly have below, that states can conclude that refusing to fund medically necessary abortions will save public assistance funds. The assertion is supported solely by one article’s misleading characterization of the results of studies (not in the present record) of abortion laws in other countries, where both the laws and the countries’ contraceptive traditions are dramatically different from those involved here. See R. 111: Plaintiffs’ Memorandum, 6-9. Both the District Court and the Court of Appeals understandably paid the argument no heed when it was presented, along with appellees’ more detailed rebuttal. *Id.* As Mr. Justice Stevens said in denying a stay in this case, “Both the findings of the District Court and the record before me compellingly demonstrate that it is less expensive for the State to pay the entire cost of an abortion than it is for it to pay only its share of the costs associated with a full-term pregnancy. . . . [T]he State will benefit financially. . . .” *Williams v. Zbaraz*, 99 S.Ct. 2095, 2098 (May 24, 1979).

These factors preordained the result in *Maier*. The equal protection clause does not require the state to subsidize the exercise of protected rights, even fundamental ones, in contexts where it has established no subsidy program at all; and so it did not require Connecticut to subsidize non-medically necessary abortions when the state had no existing program for subsidizing other, non-medically necessary procedures just because they happened to be provided by physicians. In the present case, however, medically necessary abortions are singled out as the only medically necessary procedure not covered under otherwise comprehensive medical assistance programs.* It is that discrimination that calls the equal protection clause into play.

* The United States points out, Jurisdictional Statement, 16n.8, that the Medicaid program does not fund in-patient hospital care in institutions for mental disease for persons between the ages of 18 and 65, or in institutions for tuberculosis. But its reliance on this restriction, citing *Kantrowitz v. Weinberger*, 388 F.Supp. 1127 (D.D.C. 1974), *aff’d*, 530 F.2d 1034 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 819 (1976), and *Legion v. Richardson*, 354 F.Supp. 456 (S.D. N.Y. 1973), *aff’d sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973), is misplaced. The failure to fund through Medicaid certain state-provided institutional care does not make rational the former exclusion on the grounds that Congress, in passing Medicaid and Medicare, had determined that patients in such institutions had historically been the responsibility of the states and should remain so. *Legion*, 354 F.Supp. at 459; see also S. REP. NO. 404, 89th Cong., 1st Sess., reprinted in [1965] U.S. CODE CONG. & AD. NEWS 2086. By definition, the “exclusion” only applies where the care is expected to be provided and has always been provided by the state, regardless of federal reimbursement. This constitutes neither an actual exclusion nor a barrier to care. In similar fashion, if Illinois had a non-Medicaid, generally available program of free abortions in state clinics, there would be no need for an overlapping system of Medicaid reimbursement.

Moreover, Medicaid coverage of outpatient psychiatric services does not, despite the United States’ suggestion, Juris-

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Stripped of the support they seek from *Mahe*r, appellants must somehow claim that it is rational to sacrifice maternal health and life, a woman's privacy, and considerable public funds to some legitimate state interests at stake here. Attempting to delineate such an interest, the United States speaks of a "desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant." Jurisdictional Statement, 13. This is an expression, not of legitimate interest, but of constitutional conclusion. Any invidious discrimination in a spending program could similarly be

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dictional Statement, 16n.8, change this analysis. The question here is not one of preference for one among two equally effective "kinds of treatment." By definition, childbirth is not an effective treatment when a medically necessary abortion is in order. R. 101: Exh. C, Depp Affidavit, ¶s 11-12.

Appellant Quern appears to be alluding to something more far-reaching when he characterizes the Illinois medical assistance programs as "non-comprehensive." Jurisdictional Statement, 17. The characterization is inaccurate if it is meant to suggest that Illinois excludes medically necessary procedures other than abortion. The Illinois Medicaid program covers "essential medical care." ILL. REV. STAT. ch. 23, § 5-1. The state-funded programs cover "necessary" medical "care" or "treatment." *Id.* at §§ 6-1, 7-1.

The Illinois Department of Public Aid Rules, set out at App. B, pp. 8a-14a *infra*, do exclude certain procedures from coverage. In the Court of Appeals, for instance, appellants placed reliance on the exclusions of artificial insemination, cosmetic surgery, acupuncture and non-therapeutic sterilization, and the restriction on quantities of drugs. These exclusions, however, represent plausible judgments that the procedures in question are not medically necessary. Its treatment of medically necessary abortions aside, if Illinois does exclude a type of medically necessary care from a category of care covered under its Medicaid Program, then it is acting in contravention of the Act. See *Zbaraz v. Quern*, 596 F.2d 196, 198-99 (7th Cir. 1979). Illinois' exclusion of medically necessary abortions from coverage is permissible under Title XIX only if the Hyde Amendment implicitly amends the substantive provisions of the Act. *Id.* at 199.

justified by taxpayer desire. Cf. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). Appellant Quern and the intervenors speak of the state's interest in encouraging "childbirth," Intervenor's Jurisdictional Statement, 17; Quern Jurisdictional Statement, 18, citing *Mahe*r v. *Roe*, 432 U.S. 464 (1977), for the authority of the state to favor such an interest over a woman's right to seek an abortion. But in explaining the nature of such a state interest in *Mahe*r, this Court consistently referred not to "childbirth" but to "normal childbirth," *Id.* at 477, 478 (citing *Beal v. Doe*, 432 U.S. 438, 446 (1977)), which this Court has never held to encompass childbirth endangering the life or health of a woman. This Court's opinions establish rather that the State has no legitimate interest in promoting childbirth which is abnormal because it will be the proximate cause of impairing the woman's health. To injure the mother does not "rationally further" any state interest in normal childbirth. *Mahe*r, 432 U.S. 464, 478 (1977) (emphasis added).

The only legitimate interest of the state here is the same one the Court identified in *Wade* and other abortion decisions: protection of potential life. Illinois' devastating way of protecting that interest is reckless in the extreme. Perhaps inadvertently the United States captures exactly what is at stake here. "Congress [and presumably Illinois] could," the United States claims, "rationally choose not to fund any abortions [under state Medicaid programs]." Jurisdictional Statement, 16. This claim is made in the course of depicting the Illinois program restrictions as a mere "policy choice," as if all values were fungible, and as if *Roe v. Wade* and subsequent abortion decisions of this Court did not exist. If the United States is right, and actual maternal life, health and privacy could be sacrificed to potential life,

then rationality loses all meaning. If the rationality requirement retains any content, however, it places Illinois' reckless disregard of maternal life and health beyond legislative authority.

The District Court holding can also be affirmed because the appropriate equal protection test is strict scrutiny. The District Court rejected applicability of the compelling state interest test because it found, on the basis of *Maier*, that "there is no fundamental right to a publicly funded abortion. . . ." U.S. Jurisdictional Statement, at 12a. This misstates the fundamental right involved. The fundamental right is in making the abortion decision, *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Colautti v. Franklin*, 439 U.S. 379 (1979); see *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978), not in the receipt of public funds, just as in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the plaintiffs' fundamental right was in deciding to travel, not in receiving welfare. But well-established fourteenth amendment law forbids the state to discriminate without compelling justification against exercise of that right, even if the discrimination is in a funding program. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); see *Califano v. Webster*, 430 U.S. 313 (1977); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). *Maier v. Roe*, 432 U.S. 464, 470 (1977), explicitly reaffirms this principle, and nothing in it implies the contrary.

In this case, the only legitimate state interest furthered by the discrimination is protection of potential life. But *Roe v. Wade* itself established that such an interest is less than compelling until viability, while it is the pre-viability period that is in issue here. The equal

protection clause thus forbids the discrimination against appellee Doe's fundamental right to protect her health by choosing to have an abortion.

The District Court rejected this analysis, relying in large measure on this Court's discussion in *Maier* of *Shapiro v. Thompson*, 394 U.S. 618 (1969). The *Shapiro* discussion came in answer to the extreme claim advanced in *Maier*—that the state had an affirmative obligation to finance a woman's exercise of her fundamental privacy right. This Court rejected the analogy to *Shapiro*, saying:

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under either the penalty analysis of *Shapiro* or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and [the later case of] *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. *Maier v. Roe*, 432 U.S. at 474n.8.

But what Illinois has done here is precisely analogous to the state action in *Shapiro* and quite unlike the state action in *Maier*.

Consider the case of a state without a medical assistance program that receives a request from a pregnant woman to finance an abortion she desires only because she does not want a child. Any claim of constitutional right to such financing would be rejected, because a state need not affirmatively subsidize exercise of even the most "fundamental" of rights. It is precisely such a claim for subsidy that this Court saw itself facing

in *Maier*. The plaintiffs there sought medical assistance funding for a nonmedical matter—purely elective abortions—and they had no more of a constitutional claim to it than they would to medical assistance funding to get them to the polls on election day.

In this case, however, in the context of state programs covering medically necessary services generally, plaintiffs, whose pregnancies endanger their health, seek medical assistance funding for necessary medical care. They are told that their health must be endangered, that their medical needs must be disregarded, because the medical treatment they require involves the exercise of the fundamental right to choose to have an abortion. That is precisely analogous to the refusal in *Shapiro* to extend welfare benefits to the single class of people who had exercised their fundamental right to interstate travel. It is virtually indistinguishable from a similar denial of medical benefits in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). In fact, the state action here is more clearly a “penalty” than that in either *Shapiro* or *Maricopa County*. *Shapiro* did not rest upon a determination that denial of welfare actually deterred interstate travel, 394 U.S. 618, 650 (1969) (Warren, C.J. dissenting). See *Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972). Similarly in *Maricopa County*, “there [was] no evidence . . . that anyone was actually deterred from traveling by the challenged restriction.” 415 U.S. 250, 257 (1974). But here the Illinois law restricting abortion funding was intended to act* and

* The record amply demonstrates that the Illinois legislature was motivated by a desire to stop abortions for welfare recipients. Foreclosed by *Roe v. Wade* from outlawing abortions outright, the legislature chose the one group of people it thought it might prevent from obtaining abortions.

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does act as a very substantial impediment to poor women obtaining medically necessary abortions. See *Singleton v. Wulff*, 428 U.S. 106, 117 (1976). Defendant Quern expressed the opinion that it “would effectively result in the denial of a medical procedure, abortion, to low income persons who depend on public assistance programs for payment of medical bills.” R.8: Plaintiffs’ Memorandum, Exh. A; see p. 9n. *supra*. There is here, in other words, not only a penal result similar to that in *Shapiro* and *Maricopa County*, but the intentional and successful use of that penalty to deter exercise of specially protected fundamental rights.

III.

THIS COURT IS WITHOUT JURISDICTION OVER THE INTERVENORS’ APPEAL INsofar AS IT SEEKS REVIEW OF THE EARLIER COURT OF APPEALS’ DECISION HEREIN.

The Court of Appeals held that Title XIX of the Social Security Act, standing alone, required Illinois to cover all medically necessary abortions under its Medicaid program, but that the Hyde Amendment on appropriations had substantively amended Title XIX to permit Illinois to deny state support for all abortions other than those for which the Hyde Amendment provided federal funding. *Zbaraz v. Quern*, 596 F.2d 196, 199-202 (1979). The intervenors had argued that neither Title XIX nor the Hyde Amendment required Illinois to fund any abortions at all under its Medicaid program. Under this

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Representative Bradley’s remarks quoted above, see p. 14n. *supra*, reflect the pervasive attitude of the Illinois legislature that abortion is the equivalent of homicide and hence to be stopped in virtually any way available. The Illinois legislative debates are contained in the record at R. 26: Addendum I-L.

view, plaintiffs-appellees would not have been entitled to even the limited injunction requiring coverage of all Hyde Amendment abortions which the Court of Appeals directed the District Court to enter on remand. *Id.* at 202. R. 87: Order, February 15, 1979 (entering injunction).*

On May 2, 1979, by the same notice of appeal by which they took their appeal to this Court from the April 30, 1979, District Court judgment, the intervenors purported to invoke 28 U.S.C. § 1252 (1976) to secure as well review of the Court of Appeals' decision. Intervenors' Jurisdictional Statement, at App. 11-12. The notice of appeal was filed in the United States District Court for the Northern District of Illinois. *Id.* at App. 9. It came 79 days after the Court of Appeals' decision it purports in part to appeal.

The attempt to secure appellate review of the Court of Appeals' decision falters on two independent grounds: first, no timely appeal from that decision—indeed no appeal at all—was taken within the meaning of the Rules of this Court; and second, even if a timely appeal had been taken from that decision, 28 U.S.C. § 1252 would not confer upon this Court jurisdiction to review the decision.

Supreme Court Rules 10 and 11, and 28 U.S.C. § 2101 (1976), as well as 28 U.S.C. § 1252, are determinative of this Court's jurisdiction to review on direct appeal the

* The District Court's subsequent April 30, 1979, injunction requiring coverage of all pre-viability medically necessary abortions did not entirely supersede the force of this earlier order. Thus, the February 15, 1979, injunction continues to require coverage of certain classes of abortions which the April 30, 1979, Order does not: *viz.*, all post-viability Hyde Amendment abortions, and pre-viability abortions for victims of rape and incest, even if not medically necessary.

Court of Appeals' decision at the intervenors' behest. Rule 10 provides that for an appeal from a federal court to be "taken" at all, the appellant must file his notice of appeal with the clerk of the court from which "the appeal is taken." Rule 11 requires, with exceptions not relevant here, that an appeal is "in time" when the notice of appeal is filed in the "appropriate court within the time allowed by law. . . ." The time "allowed by law" is set forth in 28 U.S.C. § 2101: a direct appeal under section 1252 "shall be taken within thirty days after the entry of the . . . judgment [being appealed]."

Thus, for the intervenors to have taken a timely appeal from the Court of Appeals' decision under 28 U.S.C. § 1252, they must have filed their notice of appeal within thirty days from that decision, and in the Court of Appeals. They did neither.*

The intervenors offer no reason for their failure to comply with Rules 10 and 11 or 28 U.S.C. § 2101. But in any case there is no "excusable neglect" or "harmless error" by which a party who has failed to take an appeal in a timely fashion—much less taken one at all—can escape the mandate of the rules requiring that one do so. "The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *United States v. Robinson*, 361 U.S. 220, 229 (1960). Appeals to this Court are consistently "dismissed for failure to file [a] notice of appeal within [the] time provided by this Court's Rule 11 and 28 U.S.C. § 2101." *Gabriel v. United States*, 429 U.S. 877,

* The intervenors have *never* filed a notice of appeal from the Court of Appeals' decision in that Court. Their appeal thus has never been "taken" at all within the meaning of Rule 10 requiring that "[an] appeal . . . shall be taken by filing a notice of appeal, . . . at the place prescribed by this rule. . . ."

877 (1976); see *Richardson v. Blumenthal*, 435 U.S. 939 (1978); *Art Theater Guild, Inc. v. Ohio ex rel. Schoen*, 421 U.S. 957 (1975); *Neale v. Hayduk*, 420 U.S. 915 (1975).*

Dismissal of the intervenors' appeal from the Court of Appeals' decision is independently required because 28 U.S.C. § 1252 does not confer jurisdiction upon this Court to review it:

Direct appeals from decisions invalidating Acts of Congress.

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . . holding an

* The intervenors' failure to file their notice of appeal from the Court of Appeals' decision in the "appropriate court" also dooms any argument they might advance that their appeal under 28 U.S.C. § 1252 should be construed as an appeal under 28 U.S.C. § 1254(2) (1976), providing for an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." For an appeal to be "taken" under this provision within the meaning of Rule 10 and to be "in time" within the meaning of Rule 11, it would also have to be filed in the Court of Appeals. Moreover, for an appeal to be "taken," the notice of appeal must "specify the statute or statutes under which the appeal to this Court is taken." S.Ct. R. 10. Nor is review of the Court of Appeals' decision at the intervenors' behest available under 28 U.S.C. § 2103 (1976), which authorizes the papers upon which appeals are taken to be treated as a petition for a writ of certiorari if the appeal to this Court "is improvidently taken." For this is not a case where the intervenors' appeal from the Court of Appeals' decision has been "improvidently" taken; it is one where no timely appeal has been taken at all. Compare *Palmore v. United States*, 411 U.S. 389, 395-97 (1973), and *El Paso v. Simmons*, 379 U.S. 497, 501-03 (1965) (granting certiorari pursuant to section 2103, after dismissing appeals because not within Court's appellate jurisdiction under 28 U.S.C. §§ 1254 or 1257 (1976)), with cases cited at pp. 27-28 *supra* (not considering applicability of section 2103, after dismissing appeals as untimely). See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 515, 526n.4 (1957) (Frankfurter, J. dissenting).

Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States . . . is a party. 28 U.S.C. § 1252.

See also 28 U.S.C. § 2101.* This language simply does not describe the Court of Appeals' decision, which did not address the constitutionality of any federal statutory provisions. *Zbaraz v. Quern*, 596 F.2d 196, 202 (1979).

The intervenors rely on language in *Fusari v. Steinberg*, 419 U.S. 379, 387n.13 (1975), and *United States v. Raines*, 362 U.S. 17, 24n.4 (1960), that an appeal under 28 U.S.C. § 1252 brings the "whole case" before the Court. This reliance is misplaced. *United States v. Raines* and its few successors, e.g., *McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975), are cases in which the only decision or judgment being appealed is one holding an "Act of Congress unconstitutional" within the meaning of section 1252. It is in that context that this Court has referred to section 1252 as bringing the "whole case" before the Court.** The referent of the term "whole case" in those decisions, giving it the most expansive reasonable reading, was to all questions passed upon by the Court in the process of "holding an Act of Congress unconstitutional," 28 U.S.C. § 1252, or to matters which might provide alternative grounds for

* Providing, in relevant part, that a "direct appeal to the Supreme Court from any decision under sections 1252 . . . of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the . . . judgment [being appealed]."

** *Fusari v. Steinberg*, 419 U.S. 379 (1975), and *Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916), also cited by the intervenors (Jurisdictional Statement, 4-5), are likewise cases in which only a single decision was being appealed. In neither case, moreover, was review even being sought under section 1252.

affirmance of that decision.* Those cases therefore do not support the conclusion that section 1252 confers jurisdiction to review quite a different decision, from a different court. Indeed, read in that way, the “mandatory and jurisdictional” time limits for seeking appellate review in this Court could be rendered advisory only. Thus, the intervenors’ reading of section 1252 is, in effect, that that provision, if otherwise properly invoked to secure direct review of a decision holding an Act of Congress unconstitutional, also confers jurisdiction upon this Court to review any final judgments previously rendered in the same case, even if they were entered years before, and never appealed. Compare 28 U.S.C. § 2101.

The applicable and governing cases here are not the ones upon which the intervenors rely, but such decisions as *Farmers & Mechanics National Bank v. Wilkinson*, 266 U.S. 503 (1925), and cases cited therein, 266 U.S. at 506, e.g., *Brown v. Alton Water Co.*, 222 U.S. 325, 331-34 (1912), and *Union Trust Co. v. Westhus*, 228 U.S. 519, 522-24 (1913), which arose under the Judicial Code of 1911 or that of 1891, providing for direct appeal from the district courts to this Court in an extremely broad class of cases. In each of these cases, this Court

* These decisions may be read more narrowly, to permit review only of issues passed upon by the lower federal court and appealed to this Court, issues which might provide alternative grounds for the lower court’s decision, or threshold jurisdictional issues. Cf. *United States v. American Friends Service Committee*, 419 U.S. 7, 9n.3, 12n.7 (1974). Even under this narrower reading, this Court would have jurisdiction to reverse or vacate that part of the District Court judgment holding the Hyde Amendment constitutional (see Section I *supra*), despite appellees’ having withdrawn their appeal from that part of the District Court’s judgment, since the absence of any case or controversy as to the Hyde Amendment eliminates the District Court’s subject matter jurisdiction over that question. And see FED. R. CIV. P. 60(b)(5), (6).

dismissed direct appeals from district court decrees which merely gave effect to earlier decisions of the courts of appeals in those cases, by “apply[ing] the law of the case arising from the decision of the [appeals court].” *Brown v. Alton Water Co.*, 222 U.S. at 332. The principle governing the disposition of each appeal in this Court was that the direct appeal in effect sought this Court’s review of the earlier court of appeals’ decision, and that review of that decision could only be taken by an appeal from, or a writ of error directed to, the decision of that court, not under the provisions for direct appeals from the district courts. Thus, in *Union Trust Co.* this Court characterized appellants’ attempt to secure review of the court of appeals’ decision, by taking a direct appeal from the subsequent district court decision, as involving an “assertion that by virtue of the power conferred to take a direct appeal from one court, authority is given to indirectly review the decision of another and higher court . . .” 228 U.S. at 522. See discussions in *Farmers & Mechanics National Bank*, 266 U.S. at 506; *Union Trust Co.*, 228 U.S. at 521-24; *Brown*, 222 U.S. at 330-34.

Farmers & Mechanics National Bank, *Union Trust Co.*, *Brown* and their companion cases support dismissal of the intervenors’ appeal from the Court of Appeals’ decision.* Like appellants in those cases, the intervenors

* Shortly after *Farmers & Mechanics Nat’l Bank* was decided, Congress sharply restricted the types of cases which could be appealed from district courts directly to this Court. Act of February 13, 1925, ch. 229, 43 Stat. 938. Presumably for this reason, and because the types of cases which have since been subject to review by this Court on direct appeal from district courts, see, e.g., 28 U.S.C. § 2284 (1976), are not ones likely to have first gone to the court of appeals, it appears that the jurisdictional question *Farmers & Mechanics*

(Footnote continued on following page)

are seeking to secure review of a Court of Appeals' decision, by taking a direct appeal to this Court under a provision which, by its terms, does not confer jurisdiction to review that decision at all.* Like appellants in those cases, the intervenors had at their disposal provisions for review of "cases in the courts of appeals." 28 U.S.C. § 1254(1), (2) (1976). They chose not to resort to these, which might well have secured for them the review of the Court of Appeals' decision they now belatedly seek. And nothing in the Rules of this Court, the case law, the important principles underlying the finality of judgments, or the language of 28 U.S.C.

footnote continued

Nat'l Bank and its predecessors addressed did not later arise with any frequency or at all. In any event, that case, save for the later summary decision in *United States v. Naponiello*, 267 U.S. 577 (1925), would appear to be the last of its line. But neither its authority, nor that of its predecessors, has ever been called into question by any decision of this Court.

* In *Farmers & Mechanics Nat'l Bank, Brown, and Union Trust Co.*, appellants were seeking to secure review of the court of appeals' decision indirectly, by appealing from the subsequent district court order giving effect to that earlier decision. Here, of course, the District Court's decision on the constitutional questions before it did not give effect to the earlier Court of Appeals' decision, which did not address these questions. In this sense, the intervenors, by appealing from the Court of Appeals' decision under 28 U.S.C. § 1252, are seeking to do "directly" what the appellants in the *Farmers & Mechanics Nat'l Bank* line of cases sought to do "by indirection." *Union Trust Co. v. Westhus*, 228 U.S. at 522 (1913).

The intervenors' Notice of Appeal also stated that they were appealing directly to this Court, under 28 U.S.C. § 1252, the February 15, 1979, District Court Order which gave effect to the Court of Appeals' decision on the statutory questions resolved by it. Intervenors' Jurisdictional Statement, at App. 12. The intervenors' Jurisdictional Statement suggests that they have abandoned this appeal. *Id.* at 4-5. In any event, pursuit of such an appeal would fall squarely within the principle of the *Farmers & Mechanics Nat'l Bank* line of cases.

§ 1252 itself suggests that they should be permitted to secure that review now. *Cf. United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

IV.

THE SOCIAL SECURITY ACT AND IMPLEMENTING FEDERAL REGULATIONS REQUIRE ILLINOIS TO COVER ALL MEDICALLY NECESSARY ABORTIONS UNDER ITS MEDICAID PROGRAM.

When this case was previously before Mr. Justice Stevens, and then the full Court, on appellants' unsuccessful applications for a stay of the District Court's April 30, 1979, judgment,* *see Williams v. Zbaraz*, 99 S.Ct. 2095 (May 24, 1979) (Mr. Justice Stevens in chambers); *Williams v. Zbaraz*, 99 S.Ct. 2833 (June 4, 1979), appellees presented at length the arguments in support of their claim that the Social Security Act requires Illinois to cover all medically necessary abortions under its Medicaid program. *See Appellees' Memorandum in Opposition to Appellants' Applications for Stay* (the "Stay Memorandum"), filed May 18, 1979, at 12-14 and Exh. D thereto. *See also* Petition for Certiorari, 14-18.

The question of whether the Social Security Act permits Illinois to cover only those abortions necessary to preserve the pregnant woman's life, *see Intervenors' Jurisdictional Statement*, 8 (Question IV), and p. 5 *supra* (Question 3), is one not properly before this Court on this appeal. *See* Section III *supra*. If that question is addressed on its merits in this appeal, however, this Court should, for the reasons stated in the Stay Memorandum and the Petition for Certiorari summarily affirm the Court of Appeals' judgment insofar as it held

* Only the state appellant and the intervenors sought a stay.

that Title XIX, standing alone, requires Illinois to cover all medically necessary abortions under its Medicaid program, and summarily reverse it insofar as it held that the Hyde Amendment operates substantively to amend Title XIX, so as to permit Illinois to deny state support for almost all medically necessary abortions.*

CONCLUSION

For the reasons stated above, appellees' Motion to Vacate in Part, to Dismiss in Part, and to Affirm should be granted.

Respectfully submitted,

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October 29, 1979

* Indeed, if appellees are deemed to be entitled to raise their statutory Hyde Amendment claim as an alternative ground for affirmance of the District Court judgment, *see* Petition for Certiorari, 13n.14, then this Court could summarily affirm that judgment on that (alternative) ground, without reaching the constitutional questions passed upon by the District Court, or the intervenors' statutory question of whether Title XIX, standing alone, requires funding of all medically necessary abortions under state Medicaid programs.

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

JANE DOE,

Plaintiff,

vs.

JOHN H. POELKER, et al.,

Defendants.

No. 73C 565 (A)

MEMORANDUM AND ORDER

This is an action by plaintiff seeking to have declared as unconstitutional those rules and regulations of the public hospitals of the City of St. Louis, Missouri, which prohibit utilization of city hospital facilities and personnel for the performance of abortions except for medical reasons.

Plaintiff, suing under the pseudonym of Jane Doe, is a married woman who was pregnant at the time of the filing of the complaint. Defendants are John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, Director of Health and Hospitals for the City of St. Louis.

Plaintiff brings this cause of action on her own behalf and on behalf of the entire class of women who reside in St. Louis and desire to utilize the services of the St. Louis public hospitals in order to obtain abortions. Jurisdiction of this Court is invoked pursuant to 28 USC 1343, 2201 and 2202, and 42 USC 1983. Plaintiff contends that on two separate occasions during August of 1973 she sought an abortion at Starkloff Memorial Hospital, a public hospital run by the City of St. Louis, but was refused based upon

the hospital's policy against performing non-therapeutic abortions. Such policy is alleged to be violative of various constitutional rights, including: The right to privacy within the patient-physician relationship; the right to obtain medical services; the right to determine whether to bear children and maintain marital privacy; the right to receive adequate medical advice pertaining to pregnancy; and the right to equal protection and due process of law. Plaintiff seeks a judgment declaring invalid all policies and regulations of the St. Louis public hospitals which restrict the use of their personnel, services and facilities for the performance of non-therapeutic abortions, and requests that defendants be permanently enjoined from enforcing such policies.

St. Louis operates two general public hospitals, Max C. Starkloff Hospital and Homer G. Phillips Hospital, designated City Hospital Numbers 1 and 2, respectively. The policy regarding performance of abortions in the city hospitals is embodied in the hospital by-laws, which provide that abortions shall be performed only for "medical reasons" (Defendants' Answer to Plaintiff's Interrogatory No. 1). This policy was in effect at both St. Louis public hospitals at all times relevant to this lawsuit, and remains in effect today.

At trial plaintiff testified that she has two children and has miscarried five times since being married in 1965. In 1973 her husband was arrested for a felony and faced with possible imprisonment. In July, 1973, plaintiff missed her menstrual period and on August 7th she went to the gynecology clinic at St. Louis City Hospital Number 1 to determine if she was pregnant. At the clinic she was examined by a third-year medical student assigned to the hospital. Plaintiff testified that she inquired about abortion services at that time, although the student who examined her had no recollection of such a conversation. That examination disclosed no medical justification for an abortion.

On August 13th, plaintiff returned to the gynecology clinic for the results of her laboratory test. Upon being told

she was pregnant she requested that the hospital perform an abortion. The medical student who examined her on this occasion testified that he found nothing to indicate that an abortion should be performed. He stated at trial that he was not aware of the city's policy against abortions, but told plaintiff that he did not know of anyone at the hospital to refer her to that was not opposed to abortion for moral reasons. However, he made an appointment for her to visit the obstetrics clinic the next day.

On August 14, 1973, plaintiff was interviewed by Dr. William J. Ott at the Starkloff Hospital (City Hospital Number 1) obstetrics clinic, who told her that her medical condition did not indicate that an abortion was necessary, and that his personal beliefs precluded him from performing abortions. Plaintiff was examined the same day and again on August 15th by Dr. Ziad Abu Dalu, who confirmed that there were no medical reasons to justify termination of her pregnancy and that the hospital could not comply with her request for an abortion. Although Dr. Dalu did not discuss his personal beliefs with plaintiff at that time, the record discloses that as a member of the Moslem faith Dr. Dalu would refuse to participate in an abortion.

The instant suit was filed August 17, 1973. Subsequently, on August 22nd, plaintiff procured an abortion at a private St. Louis abortion clinic.

Plaintiff now contends that the above policy of the St. Louis City public hospitals contravenes certain recent court decisions which deal with the constitutionality of abortion regulation. Defendants maintain that such a policy is in violation of neither express nor judicially established constitutional principles. In addition, defendants state that continued enforcement of this policy has since 1973 been supported by Missouri statute, to wit, RSMo 197.032, which was passed in that year and which provides in part:

"1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall

be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes."

Plaintiff does not seek to challenge RSMo 197.032 in this proceeding.

Plaintiff has cited to this Court the recent companion Supreme Court case of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), which established the principle that a woman has a qualified right to obtain an abortion, which right may override the state's interest in restricting her decision during early stages of pregnancy. The Court's attention is also directed to the subsequent Eighth Circuit decision of *Nyberg v. City of Virginia*, 495 F. 2d 1342 (1974). In that case the Court was presented with a request from two duly licensed physicians that they be permitted to use the facilities of the public municipal hospital at Virginia, Minnesota, in order to perform abortions on their patients who desired such services. Although plaintiffs were members of the hospital staff, they were precluded from performing abortions there by a hospital resolution similar to that in effect at the St. Louis City public hospitals.

In *Nyberg* the Eighth Circuit Court of Appeals first stated that the abortion procedure was no more complicated than other surgical procedures which the plaintiff-physicians were permitted to perform at the hospital. In ruling in favor of the doctors, the Court went on to say at page 1346:

"It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made

by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation."

Plaintiff now claims that under the authority of these decisions, a public hospital must be required to provide facilities and personnel to any woman requesting that such hospital perform an abortion on her. This Court does not believe that the above cases were intended to establish such a broad proposition as that now urged by plaintiff.

In *Doe v. Bolton*, supra, the Supreme Court invalidated certain portions of Chapter 26-12 of the Georgia Criminal Code on grounds that it was over-restrictive of the circumstances under which a physician could perform an abortion. However, the Court explained at page 189 that:

"*Roe v. Wade*, supra, sets forth our conclusion that a pregnant woman does *not* have an absolute constitutional right to an abortion on her *demand*." (Emphasis added.)

Furthermore, in *Doe* the Court let stand Section 26-1202 (e) of the Georgia statute which provided as follows:

"Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or re-criminatory action against such person."

With regard to this provision, which is very similar to RSMo 197.032, the Supreme Court stated at pages 197-198 of its opinion:

"Under §26-1202(e), the hospital is free *not to admit* a patient for an abortion. * * * Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. * * * §26-1202(e) affords adequate protection to the hospital * * *." (Emphasis added.)

It is, therefore, axiomatic that no physician or other hospital employee may be compelled to perform an abortion in violation of his personal beliefs. *Nyberg* merely held that where a physician on the staff of a public hospital desired to perform a non-therapeutic abortion, the state could not place an absolute bar on that decision. The Court concluded at page 1347 of that opinion:

"[W]hile we propose to fashion no specific procedures which must be followed *nor to require any individual staff members to participate in* abortion procedures, we do so hold that the hospital facilities must be made available for abortion services, as they are for other medical procedures, *to those physicians and their patients who have a right to and request such facilities.*" (Emphasis added.)

A careful reading of the *Nyberg* decision discloses that it falls far short of holding that a hospital, albeit open to the public, must be forced to furnish physicians for women desiring to obtain abortions. The Court was careful to point out that :

"Contrary to the view taken by appellant, Roe and Doe do not suggest *and no hospital need provide facilities for an abortion merely upon a mother's demand.*" (Emphasis added.) 495 F. 2d at page 1346, footnote 5.

In the instant case this Court is not presented with a request from any physician desirous of using the St. Louis City hospital facilities in order to perform an abortion

upon his patient. Nor is there anything in the record to show that there is any physician presently on the staff of either public hospital in St. Louis who is willing to admit the plaintiff as his patient for such a purpose. To the contrary, all of the medical personnel who examined plaintiff at Starkloff Hospital stated emphatically that they hold strong personal beliefs against abortion, and at one point plaintiff was told that there was no one to refer her to who was willing to perform such a procedure in the absence of any medical justification.

In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles, and this Court will issue no order designed to have such an effect.

This memorandum opinion is adopted by the court as its findings of fact and conclusions of law, and the clerk of the Court is directed to prepare and enter the proper order finding for the defendants.

/s/

U. S. District Judge

December 17, 1974

APPENDIX B

ILLINOIS DEPARTMENT OF PUBLIC AID RULES

Rule 4.01 Medical Assistance Program—General Provisions

(a) Under the Medical Assistance Program, the Department pays participating providers for essential medical care for eligible persons when the care is not available without charge or covered by health insurance and the person needing care has insufficient resources available to meet the cost of the required care at Department standards.

(b) "Essential medical care" is that which is generally recognized as standard medical care required because of disease, disability, infirmity or impairment.

(c) The Department may impose prior approval requirements, as specified by rule, to determine the essentialness of medical care provided in individual situations. Such requirements shall be based on recommendations of technical and professional staff and advisory committees.

(d) When recipients are entitled to Medicare benefits, the Department shall assume responsibility for their deductible and coinsurance obligations, unless the recipients have income and/or resources available to meet these needs. The total payment to a provider from both Medicare and the Department shall not exceed either the amount that Medicare determines to be a reasonable charge or the Department standard for the services provided, whichever is applicable.

(e) The Department shall pay for services and items not allowed by Medicare only if they are provided in accordance with Department policy for recipients not entitled to Medicare benefits.

(f) The Department shall require prior approval for the prescription of any items not otherwise excluded by rule but not listed in, or in excess of the quantities listed

in, the Department Drug Manual. Approval will be given if the item or quantity is determined appropriate for the condition to be treated in the judgment of a consulting physician or dentist of the Department. Drugs shall be added to or removed from the Drug Manual on the basis of the Department's evaluation of changes in the listing of drugs recommended by the Committee on Drugs and Therapeutics of the Illinois State Medical Society. The Department evaluation shall include an assessment of the therapeutic value and cost impact.

Rule 4.011 Available Medical Services And Supplies

(a) Recipients shall have free choice of medical providers. Medical Services and supplies for which payment may be made by the Department are:

(1) AABD, AFDC, MANG, REFUGEE/REPATRIATE

- Physicians' services
- Dental services
- Podiatry services
- Chiropractic services
- Optical services and supplies
- Independent laboratory services
- Pharmacy services
- Hospital services
- Clinic services
- Home health services
- Group care services
- Medical equipment, supplies and prosthetic devices
- Medicheck services (early and periodic screening, diagnosis and treatment)
- Transportation necessary to secure medical care
- Family planning services
- Psychological services

(2) GA, AMI

- Inpatient hospital care, excluding physical rehabilitation and psychiatric services

Outpatient hospital care, excluding physical rehabilitation and psychiatric services
Organized clinic care
Laboratory services
Physicians' services
Drugs
Family planning supplies and services
Nursing home services
Emergency dental care for the relief of pain and infection, including necessary fillings and extractions
Transportation to and from the source of medical care payable by vendor payment, only with prior approval, except for emergency situations which require post approval

(b) Services and supplies for which payment will not be made:

Services available without charge
Services prohibited by State or Federal law
Experimental procedures
Research oriented procedures
Medical examinations required for entrance into educational or vocational programs
Autopsy examinations
Preventive services, except those provided through the Medichcek program for children through age 20, and required school examinations
Routine examinations
Artificial insemination
Abortion, except in accordance with Rule 4.03
Medical or surgical procedures performed for cosmetic purposes
Medical or surgical transsexual treatment services
Diagnostic and/or therapeutic procedures related to primary infertility/sterility
Acupuncture
Subsequent treatment for venereal disease, when such services are available through State and/or local health agencies

Medical care provided by mail or telephone
Unkept appointments
Non-medically necessary items and services provided for the convenience of recipients and/or their families
Preparation of routine records, forms and reports
Visits with persons other than a recipient, such as family members or group care facility staff.

Chapter 1100 Medical Assistance Program AFDO

The Medical Assistance Program provides for payment for essential medical care for eligible persons when the care is not available without charge or covered by health insurance and to the extent that resources available for payment for medical care do not meet the cost of care at Department standards for the services and/or supplies provided.

Only services and supplies which meet the Department of Health, Education and Welfare definition of medical services, and can be paid by vendor payment, are provided through the Medical Assistance Program.

1100.1 Essential Medical Care

Essential medical care is defined by the Department as that which is generally recognized as standard medical care required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the essentialness of medical care provided in individual situations based on recommendations of technical, professional staff and advisory committees. To make this determination the Department may impose prior approval requirements whenever indicated.

1100.2 Freedom of Choice

Recipients have freedom of choice among participating providers of medical services. They are free to contact or reject any medical care or treatment plans recommended subject to provisions as indicated in PO-425.2 - 430.0 - 440.2(c).

Chapter 1100 Medical Assistance Program AABD

The Medical Assistance Program provides for payment for essential medical care for eligible persons when the care is not available without charge or covered by health insurance and to the extent that resources available for payment for medical care do not meet the cost of care at Department standards for the services and/or supplies provided.

Only services and supplies which meet the Department of Health, Education and Welfare definition of medical services, and can be paid by vendor payment, are provided through the Medical Assistance Program.

1100.1 Essential Medical Care

Essential medical care is defined by the Department as that which is generally recognized as standard medical care required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the essentialness of medical care provided in individual situations based on recommendations of technical, professional staff and advisory committees.

To make this determination the Department may impose prior approval requirements whenever indicated.

1100.2 Freedom of Choice

Recipients have freedom of choice among participating providers of medical services. They are free to accept or reject any medical care or treatment plans recommended subject to provisions as indicated in PO-425.2, 430.2, 440.2(c).

Chapter 1100 Provision of Medical Services GA

The provision of medical services to recipients of General Assistance and Aid to the Medically Indigent restricts payment to necessary or essential medical care, when such care is not available without charge or covered by health insurance, and to the extent that resources available for payment for medical care do not meet the cost of care at Department standards for the services and/or supplies provided. Preventive care is not considered *essential*.

Prior to authorization of medical services outlined in this chapter, the possibility of securing these services from other agencies is to be explored.

The Department may distinguish and classify the medical services to be provided in accord with the classes of persons eligible for medical aid.

1100.1 Essential Medical Care

Essential medical care is defined by the Department as that which is generally recognized as *standard* medical care required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the essentialness of medical care provided in individual situations based on recommendations of technical, professional staff and advisory committees.

To make this determination, the Department may impose prior approval requirements whenever indicated.

1100.2 Freedom of Choice

Applicants and recipients shall be entitled to free choice of those qualified vendors of medical services meeting the requirements and complying with the rules and regulations of the department.

**IDPA, Medical Assistance Program
Handbook For Physicians**

100. Illinois Medical Assistance Program

101. *Authority*

The Illinois Medical Assistance Program is the Federal-State public assistance program which implements Title XIX of the Social Security Act (Medicaid). It is administered by the Department of Public Aid under Article V of the Illinois Public Aid Code. The Department has statutory responsibility for the formulation of policy in conformance with Federal and State requirements.

102. *Objective*

The objective of the Medical Assistance Program is to enable eligible recipients to obtain essential medical care and services necessary to preserve health, alleviate sickness, and correct handicapping conditions. Such care and services are provided when they are not either available without charge or covered by health insurance or other third party resource.

Essential care and services are those which are generally recognized as standard medical services required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the necessity of providing medical care in individual situations, with the determination based on recommendations of technical and professional staff, and advisory committees.

Both fiscal considerations and good administrative practice require the imposition of certain limitations and controls on the kind and amount of medical care and services covered in the Medical Assistance Program. Careful review of the subsequent material will enable the medical services provider to identify specific Program coverage and limitations.

MOTION FILED
NOV 13 1979

Nos. 79-4, 79-5 and 79-491

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., et al.,
Appellants,
v.
DAVID ZBARAZ, M.D., et al.,
Appellees.

No. 79-5

JEFFREY MILLER,
Appellant,
v.
DAVID ZBARAZ, M.D., et al.,
Appellees.

No. 79-~~8491~~

UNITED STATES OF AMERICA,
Appellant,
v.
DAVID ZBARAZ, M.D., et al.,
Appellees.

On Appeal from the United States District
Court for the Northern District of Illinois

MOTION FOR LEAVE TO FILE
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AND BRIEF AMICUS CURIAE

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-4

JASPER F. WILLIAM, M.D., et al.,
Appellants,

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

No. 79-5

JEFFREY MILLER,
Appellant,

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

No. 79-~~849~~1

UNITED STATES OF AMERICA,
Appellant.

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

On Appeal from the United States District
Court for the Northern District of Illinois

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE

Movants Cora McRae, et al., who are
plaintiffs in McRae v. Califano, 76 Civ.
5698 (E.D.N.Y.),* hereby move for leave to

* See McRae v. Mathews, 421 F. Supp. 533 (S.D.N.Y.
1976), vacated and remanded, Califano v. McRae,
(Footnote continued on following page)

file this brief amicus curiae in support of appellees' "Motion to Vacate in Part, to Dismiss in Part and to Affirm" in the above-captioned case.

Interest of Amici

Movants-amici include two nationwide classes of plaintiffs certified as follows:

(1) The class of pregnant or potentially pregnant women who are eligible for medical assistance provided under their state plans, who with their physicians have decided on abortions; for whom abortions are medically necessary; who have been, are or will be prevented or impeded in obtaining medical termination of their pregnancies by Public Law 94-439, Section 209, Public Law 95-205, Section 101,

(Footnote continued)

425 U.S. 1045, for further consideration in light of Beal v. Doe, 432 U.S. 438, 97 S. Ct. 2366 (1977), and Maier v. Roe, 432 U.S. 464 (1977).

and Public Law 95-480, Section 210.* The class includes women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teachings of their religion and/or the dictates of their conscience determined that an abortion is necessary; and

(2) The class of duly licensed and medicaid certified providers of abortifacient services to eligible women who are prevented or impeded from performing and/or certifying abortions for the class of women represented by the plaintiff women because of the lack of medicaid reimbursement (Memorandum and Order, dated January 29, 1979).

* The complaint has been amended by stipulation to include the continuing resolution P.L. 96-86, section 118, enacted October 12, 1979. This legislation expires November 20, 1979.

These nationwide classes are joined as plaintiffs by the Women's Division of the Board of Global Ministries of the United Methodist Church.

The McRae plaintiffs have challenged the constitutionality of the riders to the FY 1977 - FY 1980 Labor-HEW Appropriations legislation, popularly known as the Hyde Amendments.*

* These riders restrict federal funds for abortion to differing extents. The original FY 1977 rider, P.L. 94-439, Section 209, prohibited federal funding of abortion "except where the life of the mother would be endangered if the fetus were carried to term." The FY 1978 and 1979 riders expanded the exceptions to include "such medical procedures necessary for the victims of rape or incest, where such rape or incest has been reported promptly to a law enforcement agency or public health service, or . . . those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." P.L. 95-205, Section 101, and P.L. 95-480, Section 210. The continuing resolution, P.L. 96-86, Section 118, effective until November 20, 1979, differs from the FY 1979 version in that it eliminates funding for abortions undertaken to prevent "severe and long-lasting health damage. . . ."

Movants seek to file this brief as amici curiae in support of the Zbaraz appellees' "Motion to Vacate in Part" in order to underscore the impermissibility under Article III of deciding the constitutionality of the Hyde Amendment in this case. (See "Appelles' Motion to Vacate in Part, etc.," Point I.) Amici are concerned that the Zbaraz plaintiffs, who represent a narrower class and who never litigated the constitutionality of the federal riders, cannot properly or adequately represent their interests and that a decision on the Hyde Amendment in Zbaraz could adversely affect their interests.

Argument

The Zbaraz plaintiffs never challenged the Hyde Amendment. They submitted no evidence, no argument and requested no relief with respect to the federal riders. In this posture, the District Court declared

the Hyde Amendment unconstitutional only with great reluctance and did not enjoin it. Zbaraz v. Quern, 409 F. Supp. 1212, 1215 n. 3 (N.D.Ill. 1979).

By contrast, plaintiffs in McRae have made an extensive record, documenting nationwide implementation and impact of the Hyde Amendments and exploring in depth the Congressional history and purpose. This record consists of almost 5,000 pages of transcript and 500 separate exhibits. The briefs total approximately 700 pages. We are advised by the District Court (Dooling, J.) to expect a decision, which has been sub judice since December 4, 1978, on or about November 26, 1979. We anticipate that the decision will contain comprehensive findings of fact and conclusions of law on the issues of legality and constitutionality developed with respect to the Hyde Amendments.

Accordingly, to preserve the fundamental due process right not to be bound by a decision in a case which has not challenged the Hyde Amendments, the nationwide plaintiffs in McRae join appellees in urging the Court to vacate that portion of the District Court's opinion which declares the Hyde Amendment unconstitutional. Vacating this portion of the decision is required by Article III and protects against the miscarriage of justice which would result if an issue with such drastic and far-reaching consequences as the constitutionality of a nationwide restriction on medicaid abortions were to be decided in a case which did not challenge the federal statute. At the same time, amici urge the Court to grant appellees' motions as to the state medicaid restrictions in order to expedite relief for the many members of the amici classes whose entitlement to reimbursement for

medically necessary abortions is being presently curtailed by state rules which parallel the Illinois law at issue here.

Conclusion

Wherefore, appellees' motion should be granted.

Respectfully submitted,

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No. 79-4

Supreme Court, U. S.

FILED

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

**JASPER F. WILLIAMS, M.D., AND
EUGENE F. DIAMOND, M.D.,**

Appellants,

vs.

**DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own
behalf and on behalf of all others similarly situated; CHICAGO
WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit
corporation, and JANE DOE, on her own behalf and on behalf
of all others similarly situated,**

Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

**BRIEF OF INTERVENING
DEFENDANTS-APPELLANTS**

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
The Statutes Involved	6
Questions Presented	8
Statement of the Case	9
Summary of Argument	17
Argument	24
I. Introduction	24
II. Maher v. Roe and Poelker v. Doe Have Resolved All Significant Constitutional Questions Against the Plaintiffs	26
III. Abortion Funding Restrictions on Health Wel- fare Programs are a Proper Exercise of Legis- lative Spending Power and the Judiciary Should Defer to Legislative Discretion in Such Spending Matters	33
IV. There is No Constitutional Right to Public Fund- ing for Abortions or to Social Welfare for Health Purposes	37
A. The Essential Nature of Constitutional Pri- vacy is Freedom from Governmental and State Interference and Intrusion in One's Private Sphere, Not a Right to Public In- volvement and Support	38
B. There is Neither a Constitutional Right of Indigents to Receive Nor a Constitutional Obligation on the States or Federal Govern- ment to Pay Medical Expenses of Indigents..	42

V. Neither the Hyde Amendment Nor Its Illinois Counterpart P.A. 80-1091 Conflict With Equal Protection Principles of the Fifth and Fourteenth Amendments of the U.S. Constitution	44
A. Legitimacy	46
1. The Purposes of the Hyde Amendment and P.A. 80-1091 Are Legitimate	46
a. The Protection of Fetal Life	46
b. The Encouragement of Childbirth	48
c. The Recognition of the Moral Precepts and Consciences of the American People	48
d. The Fiscal and Demographic Interests of the State	49
2. "Legitimate State Interest" in Constitutional Law	50
3. The Trial Court's Misuse of the Concept of Legitimate State Interests	52
B. Rationality	54
1. The Hyde Amendment and PA 80-1091 Rationally Further the Legitimate State Interests in Fetal Life and Normal Childbirth and Employ Reasonable Classifications in Achieving This Legitimate End of State	56
2. The Hyde Amendment and PA 80-1091 Rationally Further the Legitimate State Interests in Respecting the Moral Values of the American People and Employ Entirely Rational Classifications in Achieving This Legitimate End of State	57

3. The Hyde Amendment and P.A. 80-1091 Rationally Further the Legitimate Fiscal and Demographic Interests of State and Employ Rational Classifications to Achieve These Ends	57
C. Viewed from the Perspective of the Purposes of the Medicaid Program, Legislative Classifications in the Hyde Amendment and P.A. 80-1091 Are Reasonable	60
1. The District Court's Opinion	60
2. The Reasonable Bases for the Legislative Classification Created by the Abortion Funding Restrictions	61
i) Abortion is a unique Medical Procedure since it Involves the Termination of Fetal Life	61
ii) Abortion is Unique as a Medical Procedure Since it is Morally Repugnant to Large Numbers of Taxpayers	61
iii) Abortion is Unique as a Medical Procedure Because of its Profound Demographic and Fiscal Import ..	62
iv) Abortion is Unusual as a Medical Procedure Since, in Addition to Medical Reasons, There are also Non-Medical Reasons for Abortion	62

3. The Constitutional Significance of These Reasonable Bases for the Legislative Classification Involved in the Abortion Funding Restrictions	63
D. Strict Judicial Scrutiny Does Not Apply To the Hyde Amendment or P.A. 80-1091	64
1. Neither the Hyde Amendment Nor P.A. 80-1091 Discriminate Against a Suspect Class	64
2. Neither the Hyde Amendment Nor P.A. 80-1091 Impinge Upon a Fundamental Right	64
3. Neither the Hyde Amendment Nor P.A. 80-1091 "Penalize" the Exercise of a Fundamental Right	67
VI. There Are Additional Factors Which This Court Should Consider If, Contrary to Its Jurisprudence, It Should Undertake to Pass Judgment on the Wisdom of the Congressional and State Order of Priorities Among the Various Competing State Interests Involved in the Abortion Decisions	70
A. The Existence of Alternative Medical Treatment Which is Funded Under Federal and State Medicaid Programs Eliminates any Significant Health Hazard to Indigent Pregnant Women Seeking Abortion	70
B. The Standard of "Medical Necessity" or "Medically Indicated" Urged by Plaintiffs Is Loose, Inaccurate and Misleading, Is Sub-	

ject to Misunderstanding and Abuse Within the Abortional Context and Effectively Places State Interests in the Hands of a Physician Class Whose Interests Conflict with Those of the State	76
C. The Existence of Competing and Conflicting State Interests Coupled with the Real Danger of Abuse Justify a Standard More Demanding than Medical Necessity for Payment of Public Funds for Abortion	83
VII. The Illinois Funding Limitation Is Consistent with Federal Statutory Law	84
A. The Standard for Determining the Validity of Service Limitations Is Whether They Are Reasonable and Consistent with the Objectives of the Title	84
B. In Weighing the Standards for What Abortions It Will Fund, a State May Take Into Account Its Interest in Maternal Health, Its Interest in Fetal Life, and Its Fiscal and Demographic Concerns	89
1. The State Has a Valid Interest in Maternal Health	89
2. The State Has a Valid Interest in Fetal Life	89
3. The State May Validly Consider Interests Which Are Fiscal or Demographic	90
C. Given the Available Evidence Concerning the Relative Impact of Differing Standards on Its Interests in Maternal Health and Fetal Life, Illinois Struck a Reasonable Balance	91

	PAGE
1. The Availability of Alternative Treatments Alleviates the Need for Abortions for Maternal Health	91
2. A Looser Standard Would, In Effect, Result in Funding Elective Abortions	91
3. The Illinois Limitation Is Reasonable and Consistent With the Objectives of the Act	92
D. The Application of Standard Extrinsic Canons of Statutory Construction Reinforces the Validity of the Illinois Abortion Funding Limitation	94
1. Contemporaneous Circumstances Sustain the Validity of the Illinois Limitation	94
2. The Administrative Practice of HEW Supports State Power to Limit "Health" Abortion Funding	94
3. The Interpretive Value of Appropriations Acts Supports the State's Power to Limit "Health" Abortion Funding	95
E. Conclusion: The Illinois Funding Restriction Does Not Violate Title XIX of the Social Security Act	100
Conclusion	100

TABLE OF AUTHORITIES

Constitutional Provisions

	PAGE
U.S. CONST. art. 1, §8, cl. 1	33
U.S. CONST. art. 1, §8, cl. 8	33
U.S. CONST. art. 1, §9, cl. 7	8, 33, 35
U.S. CONST. art. 1, §8	33

Cases

Allied Stores v. Bowers, 358 U.S. 522 (1959)	54
American Construction Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372 (1893)	5
Baker v. Carr, 369 U.S. 186 (1962)	18, 34, 35
Beal v. Doe, 432 U.S. 438 (1977)	31, 46, 48, 78, 84, 85, 88, 89, 94, 95
Bellotti v. Baird, 428 U.S. 132 (1975)	25
Bellotti v. Baird, U.S., 99 S. Ct. 3035 (1979)	17, 24, 25
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	84
Boddie v. Connecticut, 401 U.S. 371 (1971)	43
Bolling v. Sharpe, 347 U.S. 497 (1954)	44
Brooks v. Dewar, 313 U.S. 354 (1941)	96
Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Noostook R. Co., 389 U.S. 327 (1967)	5
City of Indianapolis v. Chase Nat. Bank, 314 U.S. 63 (1941)	5

	PAGE
Charles v. Carey, No. 79 C 4541 (N.D. Ill. filed Nov. 16, 1979)	81
Charles v. Carey, No. 79-2399 (7th Cir. December 3, 1979)	81
Coe v. Hooker, 406 F.Supp. 1072 (D. N.H. 1976)	88
Colautti v. Franklin, U.S., 99 S. Ct. 675 (1975)	17, 46
Dandridge v. Williams, 397 U.S. 471 (1970)	18, 20, 21, 37, 43, 55, 63, 64 90
Doe v. Bolton, 410 U.S. 179 (1973)	24, 30, 31, 41, 65, 81
Doe v. Mundy, 441 F. Supp. 447 (E.D. Wisc. 1977)	32
Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975)	29
D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978)	32, 87
Eisenstadt v. Baird, 405 U.S. 438 (1972)	39
Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111 (1947)	96
Fleming v. Rhodes, 331 U.S. 100 (1946)	2
FHA v. The Darlington, Inc., 358 U.S. 84 (1958)	96
Galvan v. Press, 347 U.S. 522 (1954)	97
Griswold v. Connecticut, 381 U.S. 479 (1965)	38, 41
Hamilton Brown Shoe Co. v. Wolf Brothers and Co., 240 U.S. 251 (1916)	5
Helvering v. Davis, 301 U.S. 619 (1937)	21, 55, 63
Home Insurance Co. v. New York, 134 U.S. 594 (1890) ..	55
International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243 (1938)	2
Isdrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937)	96

	PAGE
Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) ..	36
Kindly v. Lee, Equity No. 24,688 (Circuit Ct. for Anne Arundel County)	78
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911)	55
Lochner v. New York, 198 U.S. 45 (1905)	63
McLaughlin v. Florida, 397 U.S. 184 (1964)	45
McLucas v. DeChamplain, 421 U.S. 21 (1975)	2, 4, 5
McRae v. Califano, No. 76-C-1804 (E.D.N.Y. filed Oct. 1, 1976)	77
McRae v. Califano, 433 U.S. 916 (1977)	32
Maher v. Roe, 432 U.S. 464 (1977) <i>passim</i> .	
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	45, 51
Mathews v. Natural Carbonic Gas Co., 429 U.S. 181 (1976)	55
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	67, 68, 69
Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913) ..	55
Meyer v. Nebraska, 262 U.S. 390 (1923)	41, 66
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	96
Ortwein v. Schwab, 410 U.S. 656 (1973) (<i>per curiam</i>) ..	43
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	41, 66
Planned Parenthood of Central Missouri v. Danforth, 423 U.S. 52 (1975)	17, 24, 25, 46
Poelker v. Doe, 432 U.S. 519 (1977) <i>Passim</i> .	

	PAGE
Preterm v. Dukakis, No. 78-1324 (1st Cir. Brief filed October 1978)	95
Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979)	88
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	95, 96
Right to Choose v. Byrne, 398 A.2d 587 (N.J. Super. 1979)	93
Roe v. Norton, 522 F.2d 928 (2d Cir. 1975)	88
Roe v. Wade, 410 U.S. 113 (1973)	17, 24, 31, 38, 40, 41, 42, 46, 47, 62, 64, 65, 71, 72
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	19, 45, 51
Schlesinger v. Ballard, 419 U.S. 498 (1975)	44
Shapiro v. Thompson, 394 U.S. 618 (1968)	19, 38, 40, 50, 51, 63, 67, 68, 69
Stanley v. Georgia, 394 U.S. 557 (1969)	39, 42
Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923)	5
Train v. City of New York, 420 U.S. 35 (1975)	36
Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891)	38
United States v. Jackson, 390 U.S. 570 (1968)	51, 69
United States v. Kras, 409 U.S. 434 (1973)	43
United States v. Lovett, 328 U.S. 303 (1945)	36
United States v. Raines, 362 U.S. 17 (1960)	2, 3, 4, 5
330 U.S. 258 (1947)	97
United States v. United Mine Workers of America,	

United States v. Wise, 370 U.S. 405 (1962)	94
Whalen v. Roe, 429 U.S. 589 (1977)	39, 40
Wilcox v. Supreme Council of Royal Arcanum, 123 N.Y.S. 83 (1911)	93
Williams v. Zbaraz, U.S., 99 S. Ct. 2095 (1979)	16
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	63
Woe v. Califano, 460 F. Supp. 234 (S.D. Ohio 1978)	32
Zbarax v. Quern, 596 F.2d 196 (7th Cir. 1979)	3, 4, 5, 14, 16, 87, 95
Zbaraz v. Quern, 572 F.2d 582 (7th Cir. 1978)	12
Zbaraz v. Quern, 469 F.Supp. 1212 (N.D.Ill. 1979) 15, 16, 26, 29, 37, 47, 52, 59, 60, 69, 70, 72, 82	

Statutes and Regulations

Act of June 27, 1977, P.A. 80-1091, 1977 Ill. Laws (codified at ILL. REV. STAT. ch. 23, §5-5, 6-1, 7-1) (1979)	<i>passim</i>
Department of Health, Education, and Welfare Appropriations Act of 1979, Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978)	2, 6
Department of Health, Education, and Welfare Appropriations Act of 1977, Pub. L. No. 94-439, §209, 90 Stat. 1418, 1434 (1976)	3
Fed. R. Civ. P. 57	9
Illinois Abortion Law of 1975, ILL. REV. STAT. ch. 38 §81-23 (1979)	81
Joint Resolution, (H.J.Res. 440) Pub. L. No. 96-123, 93 Stat. 923 (1979)	6

Social Security Act, Title XIX, 79 Stat. 343, 42 U.S.C.	
§§ 1396 <i>et seq.</i> (1976)	<i>passim</i>
42 C.F.R. §430.0 (1978)	84
42 C.F.R. §440.20 (1978)	86
42 C.F.R. §440.130 (a) (1978)	86
42 C.F.R. §440.210 (1978)	86
42 C.F.R. §440.220 (1978)	86
42 C.F.R. §440.230 (1978)	85, 88
42 C.F.R. §440.230 (c) (i) (1978)	86
42 C.F.R. §440.230 (c) (1) (1978)	88
42 C.F.R. §440.230 (c) (2) (1978)	86, 88
28 U.S.C. §1252 (1976)	2, 4, 5
28 U.S.C. §1331 (1976)	9
28 U.S.C. §1343 (3) (1976)	9
28 U.S.C. §1343 (4) (1976)	9
28 U.S.C. § 2261 (1976)	9
28 U.S.C. §2403 (a) (1976)	14
42 U.S.C. §601 (1976)	10, 90
42 U.S.C. §1396 a (a) (10) (C) (1976)	87, 88
42 U.S.C. §1396 (a) (13) (C) (1976)	86
42 U.S.C. §1396 a (a) (13) (B) (1976)	85, 86
42 U.S.C. §1396 (a) (13) (B) (1976)	85
42 U.S.C. § 1396 a (a) (17) (1976)	84
42 U.S.C. §1396 (d) (a) (1976)	85, 86
42 U.S.C. §1983 (1976)	9

Miscellaneous Authorities

Babikian, <i>Abortion</i> , in Vol. 2 A COMPREHENSIVE TEXT-BOOK OF PSYCHIATRY 1496-1500 (4th ed. 1978)	75
Barno, <i>Criminal Abortion Death, Illegitimate Pregnancy Deaths, and Suicides in Pregnancy</i> , 98 AM. J. OBSTET. GYNECOL. 356 (1967)	74
Cranley, <i>Managing Varicose Veins in Pregnancy</i> , 7 CONTEMPORARY OB/GYN 143 (1976)	74
Ekblad, <i>Induced Abortion on Psychiatric Grounds</i> , 99 ACTA PSYCHIAT. NEURAL. SCAND. 1 (1955)	75
122 CONG. REC. 20410 (1976)	46, 49
122 CONG. REC. H 6647-6661 (daily ed. June 24, 1976)	33
122 CONG. REC. S 10787-10807 (daily ed. June 28, 1976)	33
122 CONG. REC. H 8631-8641 (daily ed. August 10, 1976)	33
122 CONG. REC. H 8631-41 (daily ed. August 25, 1976)	33
122 CONG. REC. S 14562-14570 (daily ed. August 25, 1976)	33
122 CONG. REC. H 10312-10318 (daily ed. September 16, 1976)	33
122 CONG. REC. S 16112-16121 (daily ed. September 17, 1976)	33
122 CONG. REC. S 17296-17302 (daily ed. September 30, 1976)	33
123 CONG. REC. H 6082-6098 (daily ed. June 17, 1977)	33
123 CONG. REC. S 11041-11056 (daily ed. June 29, 1977)	33
123 CONG. REC. H 8327-8353 (daily ed. August 2, 1977)	33
123 CONG. REC. S 13668-13678 (daily ed. August 4, 1977)	33
123 CONG. REC. H 10128-10134, 10170 (daily ed. September 27, 1977)	34

	PAGE
123 CONG. REC. H 10129-30 (daily ed. September 27, 1979)	79
123 CONG. REC. H 10130 (daily ed. September 27, 1977)	80
123 CONG. REC. H 10829-10838 (daily ed. October 12, 1977)	34
123 CONG. REC. H 10966-10970 (daily ed. October 13, 1977)	34
123 CONG. REC. S 17900-17902 (daily ed. October 27, 1977)	34
123 CONG. REC. S 18584-91, C 18621-22 (daily ed. November 3, 1977)	34
123 CONG. REC. S 18589 (daily ed. November 3, 1977)	79
123 CONG. REC. H 12167-12175 (daily ed. November 3, 1977)	34
123 CONG. REC. S 19236-19240 (daily ed. November 29, 1977)	34
123 CONG. REC. H 12485-12494 (daily ed. November 29, 1977)	34
123 CONG. REC. H 12651-12658 (daily ed. December 6, 1977)	34
123 CONG. REC. H 12770-75, H 12929-31 (daily ed. December 7, 1977)	34
124 CONG. REC. H 5363, H 5371 (daily ed. June 13, 1978)	34
124 CONG. REC. H 10798-10800 (daily ed. September 26, 1978)	34
124 CONG. REC. S 16312-16338 (daily ed. September 27, 1978)	34
124 CONG. REC. H 11493-97 (daily ed. October 4, 1978)	34
124 CONG. REC. H 12468-87, H 12516-20 (daily ed. October 12, 1978)	34

	PAGE
124 CONG. REC. H 12969-75 (daily ed. October 14, 1978)	34
125 CONG. REC. H 5253-5262 (daily ed. June 27, 1979)	34
125 CONG. REC. S 59873 (daily ed. July 19, 1979)	96
125 CONG. REC. S 9851-9873 (daily ed. July 19, 1979)	34
125 CONG. REC. S 13253-55 (daily ed. September 24, 1979)	34
125 CONG. REC. S 13573-75 (daily ed. September 27, 1979)	34
125 CONG. REC. S 13736-43 (daily ed. September 28, 1979)	34
125 CONG. REC. H 8856-58 (daily ed. October 9, 1979)	34
125 CONG. REC. S 14325 (daily ed. October 10, 1979)	34
125 CONG. REC. S 14496 (daily ed. October 12, 1979)	34
125 CONG. REC. H 9885 (daily ed. October 30, 1979)	97, 98, 99
125 CONG. REC. H 9884-86 (daily ed. October 30, 1979)	34
125 CONG. REC. S 16710-14 (daily ed. November 15, 1979)	34
125 CONG. REC. H 10955-59 (daily ed. November 16, 1979)	34
125 CONG. REC. S 16882-83 (daily ed. November 16, 1979)	34
125 CONG. REC. H 11614-11623 (daily ed. December 6, 1979)	34
125 CONG. REC. H 11772 (daily ed. December 11, 1979)	97
125 CONG. REC. H 11770-76 (daily ed. December 11, 1979)	97
43 Fed. Reg. 45,176 (Sept. 29, 1978)	88

	PAGE
43 Fed. Reg. 57,253 (December 7, 1978)	85, 88
Freund, et al., <i>Hemodynamic and Metabolic Studies of a Case of Toxemia of Pregnancy</i> , 127 Am. J. Obstet. Gynecol. 206 (1977)	73
Gabbe, <i>New Ideas on Managing the Pregnant Diabetic Patient</i> , 13 CONTEMPORARY OB-GYN 109 (1979)	74
Gant, et al., <i>Clinical Management of Pregnancy-Induced Hypertension</i> , 21 CLINICAL OBSTETRICS AND GYNECOLOGY 397 (1978)	73
George, <i>Current Abortion Laws: Proposal and Movements for Reform</i> , 17 WEST. R. L. REV. (1965)	32, 94
Department of Health, Education, and Welfare, <i>Center for Disease Control</i> , 28 MORBIDITY AND MORTALITY WEEKLY REPORTS 4 (Feb. 2, 1979)	12
Fiakpui and Moran, <i>Pregnancy in the Sick Hemoglobinopathies</i> , 11 JOURNAL OF REPRODUCTIVE MEDICINE 28 (1973)	72
Hardy, <i>Privacy and Public Funding, Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams</i> , 18 ARIZONA L. REV. 903 (1976)	58
Illinois Senate, <i>Transcript of Debate on H.B. 333</i> , June 27, 1977	49
Karst, <i>The Fifth Amendment's Guarantee of Equal Protection</i> , 55 N.C.L. REV. 540 (1977)	77
NATHANSON, <i>ABORTING AMERICA</i> (1979)	77

	PAGE
Planned Parenthood Washington Memo., SUPREME COURT TO INDIGENT WOMEN: LET THEM EAT CAKE (1978)	79
THE MERCK MANUAL 953 (13th ed. R. Berkow (1977)	73
Tietze and Dawson, <i>Induced Abortion: A Fact Book</i> , in REPORTS ON POPULATION/FAMILY PLANNING (1973)	58
Townsend, <i>HIGH BLOOD PRESSURE AND PREGNANCY</i> (1st ed. 1959)	73
TUNICK, <i>An Internist Looks at Varicose Veins</i> , 11 CONTEMPORARY SURGERY 112 (1977)	73
Tussman and tenBroek, <i>The Equal Protection of the Laws</i> , 37 CALIF. L. REV. 341 (1949)	37, 55
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1972)	93
Zuspan, <i>Problems Encountered in the Treatment of Pregnancy Induced Hypertension</i> , 131 AM. J. OBSTET. GYNECOL. 591 (1978)	73
Preventive Medicine Division for the State of Maryland, <i>Induced Abortion Surveillance Report of the Department of Health and Mental Hygiene</i> (1972)	78
<i>Induced Abortion Surveillance Report of the Department of Health and Mental Hygiene, Preventive Medicine Administration</i> (Calendar Year 1976)	78
Pritchard and Pritchard, <i>Standardized Treatment of 154 Consecutive Cases of Eclampsia</i> , 123 AM. J. OBSTET. GYNECOL. 543 (1975)	73
Rich, <i>Senate Measure Found to Permit Most Abortion</i> , Wash. Post, July 8, 1977, at 1	80
Sim, <i>Abortion and the Psychiatrist</i> , 2 BRIT. MED. J. 145-148 (1963)	74

**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

No. 79-4

**JASPER F. WILLIAMS, M.D., AND
EUGENE F. DIAMOND, M.D.,**

Appellants,

vs.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; **CHICAGO WELFARE RIGHTS ORGANIZATION**, an Illinois not-for-profit corporation, and **JANE DOE**, on her own behalf and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

BRIEF

Of Intervening Defendants-Appellants

Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division is reported at 469 F.Supp. 1212 (N.D. Ill. 1979).

The opinion of United States Court of Appeals for the Seventh Circuit is reported at 596 F.2d 196 (7th Cir. 1979).

JURISDICTION

This is a civil proceeding to which the United States is a party and in which, *inter alia*, an Act of Congress, the Department of Health, Education, and Welfare Appropriations Act of 1977, Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978) (hereinafter the "Hyde Amendment"), has been held unconstitutional. The final judgment of the district court was entered on April 30, 1979. Notice of Appeal to this Court was duly filed by the Intervening Defendants-Appellants Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. (hereinafter "intervenors") in the United States District Court for the Northern District of Illinois, Eastern Division on May 2, 1979, and is set forth in the Appendix. A. 146.

The jurisdiction of this Court to hear this appeal rests on 28 U.S.C. §1252 (1976), which confers jurisdiction upon this Court to review by direct appeal the decision of a district court holding an Act of Congress unconstitutional in any civil action to which the United States is a party. Prior to the entry of final judgment in the district court, the United States intervened and participated in this litigation at the trial level. The following cases sustain the jurisdiction of this Court to review the judgment below on direct appeal from the district court: *McLucas v. De Champlain*, 421 U.S. 21 (1975); *United States v. Raines*, 362 U.S. 17 (1960); *Fleming v. Rhodes*, 331 U.S. 100 (1946); *International Ladies' Garment Workers' Union v. Donnelley Garment Co.*, 304 U.S. 243 (1938).

In their Motion to Vacate in Part, to Dismiss in Part, and to Affirm, the Plaintiffs-Appellees (hereinafter "plaintiffs") argued that this Court has no jurisdiction because

they did not challenge the federal statute, the Hyde Amendment, in their pleadings. In support of their position, plaintiffs cited *United States v. Raines*, 362 U.S. 17, 21 (1960), a case in which this Court indicated that it "will never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." A brief look at the procedural history of this case will reveal to this Court not only its jurisdiction over this case, but also must undertake the "necessity of deciding" it.

Plaintiffs challenged, on constitutional as well as federal statutory grounds, the validity of an Illinois law, restricting public funding of abortion [Act of June 27, 1977, P.A. 80-1091, 1977 Ill. Laws; at ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1 (1979) (hereinafter cited as "P.A. 80-1091")]. P.A. 80-1091 was modeled after the original Hyde Amendment enacted by Congress in 1976.¹

The United States District Court for the Northern District of Illinois invalidated P.A. 80-1091 on the theory that it conflicted with the federal Medicaid Act, Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. 1396 *et seq.*, (1976) (hereinafter referred to as "Title XIX") which the court interpreted to require the States participating in the medicaid program to fund all procedures which a physician deems "medically necessary."

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the district court, finding that the Hyde Amendment had substantively amended Title XIX. Therefore, it ruled Illinois was not required by Title XIX to fund abortions other than those covered by the Hyde Amendment. *Zbaraz v. Quern*, 596 F.2d 196, 202 (7th Cir. 1979). The Hyde Amendment thus became a central factor in this case. The Seventh Circuit remanded the case

¹ The Department of Health, Education, and Welfare Appropriations Act of 1976, Pub. L. No. 94-439, 209, 90 Stat. 1418 (1976).

to the district court with instructions to resolve the constitutionality of the Hyde Amendment and P.A. 80-1091, and directed that the district court's

consideration should include, *inter alia*, whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment in view of the fact that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right.

Zbaraz v. Quern, 596 F.2d at 202.

Thus, it was appropriate and necessary for the district court to rule on the Hyde Amendment, and this Court clearly has jurisdiction to determine the constitutionality of this Act of Congress. In *McLucas v. De Champlain*, 421 U.S. 21 (1975), this Court noted:

[t]he language of the statute [§1252] sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality. The purpose of §1252 is too plain to allow circumvention, whatever doubts may be entertained about the wisdom of mandatory direct review in other circumstances. Our previous cases have recognized that this Court's jurisdiction under §1252 in no way depends on whether the district court had jurisdiction.

Id. at 31.

In *United States v. Raines*, 362 U.S. 17 (1960), this Court found that it had jurisdiction "since the basis of the decision below in fact was that the Act of Congress was unconstitutional, no matter what the contentions of the parties might be as to what its proper basis should have been." *Id.* at 20.

An appeal taken under §1252 brings the "whole case" before this Court, and thus the question of the constitutionality of P.A. 80-1091 comes properly before it. *McLucas v. De Champlain*, 421 U.S. 21 (1975); *United States v. Raines*, 362 U.S. 17 (1960).

This Court's jurisdiction over the "whole case" also allows review of the question of whether the State of Illinois is permitted to fund only those abortions necessary to preserve the life of the mother under Title XIX of the Social Security Act. The Seventh Circuit in *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), held that Title XIX had been amended by the Hyde Amendment and thus, that Title XIX allowed states to have restrictive abortion funding policies, but only to the extent the Hyde Amendment provides they may. Although this *Zbaraz* appeal to the Seventh Circuit was from a final order entered in the district court, the Seventh Circuit's reversal and remand back to the district court resulted in the Seventh Circuit's appellate proceedings becoming interlocutory in nature. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967). See also *American Const. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). A party is not required to petition for *certiorari* to review an interlocutory order of a court of appeals, and the fact that a petition was not made will not prejudice that party's rights on later appeal after final judgment. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916); *City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 63 (1941); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

In sum, this Court has jurisdiction to review directly from the district court the decision of that court invalidating the Hyde Amendment on constitutional grounds, as well as all ancillary issues in this case.

The Statutes Involved

The Hyde Amendment

Department of Health, Education, and Welfare Appropriations Act of 1979, Publ. L. No. 95-480, §210, 92 Stat. 1586 (1978):

None of the funds contained in this act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-standing physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

The Hyde Amendment was extended in a Further Continuing Appropriation for 1980 signed into law by President Carter on November 20, 1970, as Joint Resolution (H.J. Res. 440) Pub. L. No. 96-123, 93 Stat. 923, 926 (1979).

Notwithstanding any other provision of this Joint Resolution except section 102, none of the funds provided by this Joint Resolution shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

The Illinois Law

Act of June 27, 1977, P.A. 80-1091, 1977 Ill. Laws (Codified at ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1) (1979):

Sec. 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

QUESTIONS PRESENTED

I. Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?

II. Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III. Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?

IV. Whether the State of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?

STATEMENT OF THE CASE

On June 27, 1977, the Illinois General Assembly passed Public Act 80-1091 to amend §§5-5, 6-1, and 7-1 of the Illinois Public Aid Code, which was originally approved April 11, 1967. P.A. 80-1091 was vetoed September 13, 1977, but became law on November 17, 1977, upon a vote by three-fifths of the legislature to override the gubernatorial veto. It provided that public funds would not be expended for abortions unless the abortions were necessary to preserve maternal life.

On December 6, 1977, plaintiffs filed a class action suit in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin enforcement of the statute, claiming jurisdiction under 28 U.S.C. §§1331, 1343(3) and (4) (1976), and seeking relief under 42 U.S.C. §1983 (1976), 28 U.S.C. §2201 (1976), and Fed.R.Civ.P. 57. They alleged that P.A. 80-1091 violated their rights under Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.* (1976), the Ninth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. In their complaint plaintiffs alleged that P.A. 80-1091 "prohibits state public assistance payments for medically necessary abortions for women otherwise eligible for medical assistance because of their indigency and, at the same time Illinois provides public assistance payments for all other types of medically necessary services to these women and all other eligible indigent persons." Accordingly, they filed a motion for a temporary restraining order or preliminary injunction.

The plaintiffs are David Zbaraz, M.D., and Martin Motew, M.D., physicians whose business includes performing abortions upon medicaid recipients; the Chicago Welfare Rights Organization, which purports to represent the interests of

medicaid recipients who desire to receive governmentally financed abortions whenever a physician considers them to be medically necessary but not necessary to preserve their lives, and who would not receive state funding for such abortions under P.A. 80-1091; and Jane Doe, a member of the same class.

Jane Doe was alleged to be a recipient of Aid to Families with Dependent Children ("AFDC") public assistance, 42 U.S.C. §§601 *et seq.* (1976), and medical assistance under the Medicaid Title, 42 U.S.C. §1396 *et seq.* (1976). Plaintiff Doe was described as a 38 year old woman who had had nine previous pregnancies, was pregnant again, and desired to have an abortion. Accompanying the motion was the Affidavit of David Zbaraz, M.D., which stated that he had reviewed the medical records of Jane Doe who had recently been examined by two other physicians on the staff of Michael Reese Hospital in Chicago, Illinois. Those records disclosed that Jane Doe had a history of varicose veins and thrombophlebitis (blood clots) of the left leg. In Dr. Zbaraz's professional opinion, on the basis of the medical records he reviewed, Jane Doe's varicose veins would recur if her pregnancy were to continue and there existed a 30% risk that the thrombophlebitis would recur necessitating hospitalization and bed rest if the fetus were carried to term. Dr. Zbaraz concluded that an abortion was medically necessary for Jane Doe, though not necessary to preserve her life.

The Defendant-Appellants (hereinafter "defendants") are Jeffrey C. Miller, Acting Director of the Illinois Department of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the Illinois statute in question; Jasper F. Williams, M.D., an obstetrician, a physician-taxpayer, and former President of the National Medical Association who on a regular and recurring basis treats women who carry their

pregnancies to term, and Eugene F. Diamond, M.D., a physician-taxpayer, a practicing pediatrician, and Professor of Pediatrics. Drs. Williams and Diamond intervened in their capacity as physician-taxpayers who support the state policy articulated by P.A. 80-1091, who conscientiously object to abortion and participation in abortion through use of their taxes in violation of the Hippocratic Oath, and whose economic interests are at stake since the outcome of this litigation may result in a loss of patients, both mothers and the children they carry. The United States intervened as a party defendant when the Hyde Amendment, an Act of Congress, was brought into issue.

During the course of proceedings in the district court, affidavits and supporting materials were submitted by both sides in support of counter motions for preliminary relief and summary judgment. The affidavits of the plaintiffs were submitted in support of the statement in their complaint that public assistance is not provided for medically necessary abortions for women otherwise eligible for medical assistance because of their indigency, while payments are provided for all other types of medically necessary services for these women. In their affidavits, plaintiffs cited several medical conditions or diseases for which their affiants would certify abortion is medically necessary or medically indicated. A. 32, 33. Plaintiffs' affiants also indicated that predictions about a pregnant woman's health condition only rarely can be made with certainty. A. at 114, 128. They indicated that "in (their) professional opinion, the effect of the new Illinois criteria for abortion coverage under the medical assistance program will be to increase substantially maternal morbidity and mortality among indigent pregnant women." A. at 111.

Intervening defendants submitted the affidavit of Jasper F. Williams, M.D., which indicated that for "each and every

medical condition for which Dr. Depp (A. at 28) indicates pregnancy creates or exacerbates a threat to maternal health or life, alternative medical treatments other than abortion exist for which the physician might be reimbursed through Medicaid." A. at 99. Intervening defendants also submitted the Department of Health, Education, and Welfare, Center for Disease Control, 28 *Morbidity and Mortality Weekly Reports* 4 (Feb. 2, 1979), which reported on the Department of Health, Education, and Welfare's hospital surveillance project on the effect of abortion funding restrictions in 13 states and the District of Columbia. The Report indicates that "[n]o increase in abortion-related complications was observed in this surveillance project . . . No abortion deaths related to either illegal or legal abortions were detected through the hospital surveillance. There was also no significant difference between institutions in funded and non-funded states in the proportion of Medicaid women with abortion complications over the eight month period (of the study)." A. at 138-139. In spite of this conflicting evidence, no evidentiary hearing was held.

On December 21, 1977, the District Court issued an unreported Memorandum Opinion and Order denying the plaintiffs' motions for a temporary restraining order or preliminary injunction and abstained pending state court adjudication. On December 22, 1977, plaintiffs appealed to the Seventh Circuit Court of Appeals.

On January 11, 1978, the Seventh Circuit Court of Appeals granted plaintiffs' motion for injunction pending appeal. On March 15, 1978, the Circuit Court reversed the opinion of the District Court on the abstention issue, vacated the injunction pending appeal and remanded the case to the district court. *Zbaraz v. Quern*, 572 F.2d 582 (7th Cir. 1978).

On May 15, 1978, the district court issued an unreported Memorandum Opinion and Order denying defendant Quern's motions to dismiss for want of jurisdiction and for summary judgment, and granted plaintiffs' motion for summary judgment after finding that the Illinois statute was in conflict with the objectives of Title XIX of the Social Security Act.

On May 23, 1978, both defendant Quern and intervening defendants Diamond and Williams moved in the district court for a stay pending appeal which was denied on that date. On May 23, the plaintiffs moved in the district court for entry of Final Judgment and Order. On May 24, 1978, defendant Quern filed a notice of appeal in the district court and the next day moved in the Circuit Court for a stay pending appeal. On May 30, intervening defendants filed a notice of appeal and applied to the Circuit Court for a stay pending appeal.

On June 13, 1978, the district court entered an amended Final Judgment and Order. On June 15, 1978, the Court of Appeals denied the defendants' motions for stay pending appeal.

On June 23, 1978, intervening defendants applied for a stay pending appeal to United States Supreme Court Justice John Paul Stevens who denied it on June 27. On June 29, the same application was made to Chief Justice Warren Burger who denied it on July 5. On July 13, 1978, the intervening defendants and defendant Quern separately filed notices of appeal from the district court's amended Final Judgment and Order.

On February 13, 1979, the United States Court of Appeals for the Seventh Circuit reversed the District Court's decision. In a Memorandum Opinion, the court stated that the district court was correct in finding that the Illinois statute was in conflict with the objectives of Title XIX of

the Social Security Act, but held that the Hyde Amendment was itself a substantive amendment to the Social Security Act and not simply a limitation on the use of funds for abortion. *Zbaraz v. Quern*, 596 F.2d 196 at 201, 202 (1979). The Court held that Illinois was thus not required by Title XIX to fund abortions other than those covered by the Hyde Amendments. The Seventh Circuit remanded the case to the district court with instructions to consider the constitutionality of both the Illinois statute and the Hyde Amendment. The district court was also ordered to modify its injunction to allow for payments for those abortions fundable under the Hyde Amendment.

Pursuant to the mandate of the Seventh Circuit, the district court by Order dated February 15, 1979, modified its permanent injunction entered on May 15, 1978, to require Illinois to fund all Hyde Amendment abortions in its enforcement of P.A. 80-1091, thereby expanding eligibility for abortion funding to cover rape and incest victims and those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Since the constitutionality of a federal statute had been drawn into question, the district court so informed the Attorney General of the United States pursuant to 28 U.S.C. § 2403(a) (1976), Order of February 22, 1979, and directed the Attorney General to notify the court whether the United States intended to seek permission to intervene for presentation of evidence and for argument on the question of the Hyde Amendment's constitutionality.

Intervention was granted the United States by an Order of March 8, 1979. Thereafter, each party submitted to the Court a motion for summary judgment supported by briefs, affidavits, and exhibits addressing the constitutional issues.

In a Memorandum Opinion dated April 29, 1979 the district court held that the Hyde Amendment and P.A. 80-1091 (as modified by court order) were unconstitutional as violative of the plaintiffs' right to equal protection of the laws. *Zbaraz v. Quern*, 469 F.Supp. 1212 (N.D. Ill. 1979). Finding that this Court's decision in *Maher v. Roe*, 432 U.S. 464 (1977) precluded any claim of a fundamental right to a state-funded abortion, or that a state's refusal to fund abortions amounted to an unconstitutional penalty, the Court declined to apply strict judicial scrutiny to either statute and instead sought to determine if there were any legitimate state interests which were rationally related to the legislative classification at issue.

The district court found that the effect of the Hyde Amendment and P.A. 80-1091 "will be to increase substantially maternal morbidity and mortality among indigent women." *Zbaraz v. Quern*, 469 F.Supp. at 1220. The court held:

a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, we believe a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations.

Id. at 1221.

In its Memorandum Opinion of April 29, 1979, and in its Final Judgment, Order and Injunction of April 30, 1979, the district court, by Judge John T. Grady, held that both the Hyde Amendment and P.A. 80-1091 were unconstitutional as applied to medically necessary abortions prior to the point of fetal viability.

Motions for Stay of the District Court's Final Judgment, Order and Injunction of April 30, 1979, were denied by the District Court on April 30, 1979. Notice of Appeal to this Court was filed by the intervening defendants on May 2, 1979, and is set forth in the Appendix at 146. On the same day the intervening defendants filed an Application for Stay Pending Appeal of the mandate of the United States District Court for the Northern District of Illinois, Eastern Division. The stay was denied by Mr. Justice Stevens on May 24, 1979. *Williams v. Zbaraz*, U.S., 99 S.Ct. 2095 (1979). A subsequent application for stay was made to Mr. Justice Rehnquist on May 24. It was referred to the full Court denied on June 4, 1979.

This appeal is taken by intervening defendants Williams and Diamond with respect to both the Final Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered February 13, 1979, in *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), and the Final Judgment, Order and Injunction of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 30, 1979, in *Zbaraz v. Quern*, 469 F.Supp. 1212 (ND. Ill. 1979).

SUMMARY OF ARGUMENT

This is a case about the appropriation and the disbursement of public funds under federal and state medicaid programs. It is not a right to privacy case.

The primary issue is whether Congress and the State of Illinois may set the standard for the disbursement of public funding for abortion.

There is no undue burden on the right to privacy involved. Thus, this case is far different than the right to privacy cases involving abortion such as *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Central Missouri v. Danforth*, 423 U.S. 52 (1975), *Bellotti v. Baird*, U.S., 99 S. Ct. 3035 (1979), and *Collautti v. Franklin*, U.S., 99 S. Ct. 675 (1979). Those cases concerned criminal statutes which punished the decision to abort. This case involves the expenditure of public funds.

Maher v. Roe, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977), have resolved all the significant constitutional issues involved in this case. In those cases, it was held that there is no due process right to public funding for abortion or for public funding for any health related procedure. *Maher v. Roe*, 432 U.S. at 474. The lower court here attempted to distinguish this case from *Maher* and *Poelker* on the theory that here the woman has a "medical need" for an abortion, whereas in *Maher* and *Poelker* the abortion sought was "purely elective." A careful study of *Maher* and *Poelker*, however, reveal that this Court did not use the term "nontherapeutic" abortion to mean "purely elective," non-health related abortion as was assumed by the lower court. Rather, the term was used in a much broader sense. Consequently, *Maher* and *Poelker* have resolved the constitutional question of public funding of the so-called health abortion as well.

Should this Court conclude, contrary to the language and reasoning of *Maier* and *Poelker*, that the issue of the public funding under federal and state welfare programs for abortions which physicians deem "medically necessary" has not been resolved, then this case must be resolved on the basis of more general constitutional principles. Under established constitutional principles applied in public welfare cases generally, including in *Maier* and *Poelker*, the decision of the lower court holding the Hyde Amendment and P.A. 80-1091 unconstitutional must be reversed.

The United States Constitution vests the legislative branch of government with the power to spend and appropriate public resources. All federal welfare programs have been created by virtue of these constitutional powers. The principles of nonjusticiability are set forth in the "political question" cases, e.g., *Baker v. Carr*, 369 U.S. 186 (1962). If those principles do not counsel nonjusticiability, they most certainly counsel prudence and the exercise of restraint by this Court in this case. Accordingly, if this Court should decide to review these congressional and state budgetary decisions, it should subject those decisions to a "low level" judicial scrutiny and defer to congressional and legislative judgment.

The abortion funding restrictions of the Hyde Amendment and P.A. 80-1091 do not involve or impinge upon fundamental due process rights, such as the right to privacy. Privacy, by its very nature, implies a zone of non-state involvement—a right to non-interference by the State. Public funding is public involvement.

There is also no constitutional obligation to fund any medical expenses of indigents. *Maier v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Dandridge v. Williams*, 397 U.S. 471 (1970). This principle is not

altered by the conclusion of a physician that an abortion is "medically necessary."

"Equal protection" is not violated by the manner in which the federal government and the State of Illinois disburse public funds under the Hyde Amendment and P.A. 80-1091. *Maier v. Roe*, 432 U.S. 464 (1977). The laws before this Court must be upheld in accord with the standards set forth in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973): 1) the state interests promoted by these statutory schemes are legitimate; 2) these statutory schemes rationally further the legitimate state interests; 3) the statutory schemes do not impinge upon fundamental rights or involve a suspect class.

Based on the legislative history of these abortion funding restrictions, at least four interests of state are involved: protection of prenatal human life, promotion of normal childbirth, recognition of moral values of the American people, and promotion of the fiscal and demographic interests of State. Each of these interests is important and legitimate.

"Legitimacy of a state interest" refers to whether the State, under the Constitution, may even pursue, protect, or promote the interest. For example, the State may not discourage the exercise of the fundamental right to interstate travel. *Shapiro v. Thompson*, 394 U.S. 618 (1968). Thus, if the result of a statute were to block the immigration of citizens from one state to another, the statute would be invalid because stopping interstate travel is not a legitimate end of state. If a state interest is legitimate, it does not cease to be legitimate because, in the opinion of a court, a different legitimate state interest ought to have been pro-

moted with limited resources. The question concerning which of various legitimate interests the State should pursue is for the legislature to determine. Nonetheless, the lower court concluded that the state's important and legitimate interests in prenatal human life lost its legitimacy because the Congress and the State of Illinois ought to have promoted another state interest, i.e., the "health" of pregnant women. Thus, under the guise of ruling on "legitimacy" the lower court performed a function reserved to the legislature; it "second-guessed" congressional and state legislative decisions on how to allocate public funds in clear violation of the principles of *Dandridge v. Williams*, 397 U.S. 471 (1970).

The abortion funding restrictions rationally further these legitimate interests of state, and do not involve classifications which are irrational. The reasonableness of the classifications of any statutory scheme can only be determined by considering the end of the state interest promoted by the statute. Here, the decision not to fund abortion unless necessary to save the life of the mother and to fund prenatal care and childbirth is rational and necessary to promote and protect the legitimate state interests involved. From the perspective of these interests, the classifications involved are entirely rational.

From the perspective of federal and state medicaid programs, the classifications are also rational and constitutional, since there are a number of reasons why abortion as a medical procedure is very different from other medical procedures, including prenatal care and childbirth, which

are funded under medicaid. Some of those reasons are that abortion involves the termination of fetal life, that abortion is repugnant to the moral values of a political majority of American and Illinois taxpayers who must now fund abortion, and that abortion may be incompatible with the State's demographic and fiscal interests. Even standing alone each of these important interests establish a reasonable basis for treating abortion differently than other medical procedures and treatment in the medicaid funding scheme.

Since the abortion funding restrictions do not impinge upon fundamental rights, do not penalize the exercise of fundamental rights, and do not discriminate against a suspect class, strict scrutiny does not apply.

If this Court, contrary to precedent (see, e.g., *Helvering v. Davis*, 301 U.S. 619 [1937]; *Dandridge v. Williams*, 397 U.S. 471 [1970]), should assume the authority to pass judgment on the wisdom of the ordering of budgetary priorities set by Congress and the State of Illinois, this Court should consider whether the abortion funding restrictions significantly increase health risks to pregnant women. The medical literature documents the existence of safe and effective alternative forms of treatment for the medical problems suggested by the lower court in support of its conclusion that the abortion funding restrictions are "cruel." A study by the Center of Disease Control establishes no significant increase in morbidity and mortality of pregnant women in those areas in which abortion funding restrictions have been in effect. Nonetheless, ignoring the existence of alternative treatment and in spite of evidence

to the contrary, the district court held that increased medical risks are involved.

The standard of "medical necessity" or "medically indicated" used for funding some other medical procedures under medicaid is not appropriate for the funding of abortion because of the existence of non-medical reasons for abortion and the tendency of the term "medical necessity" to be very loose and, thus, subject to abuse. In effect, the use of the "medical necessity" standard for public funding of abortions will result in the public funding of elective abortion and the unnecessary destruction of other competing important and legitimate interests of state. The Hyde Amendment and P.A. 80-1091 represent a most responsible and wise compromise designed to maximize, to the extent possible, all of the various state interests involved in a decision to abort.

The Seventh Circuit Court of Appeals in its ruling on the compatibility of P.A. 80-1091 with federal statutory requirements of the Medicaid Title stated that without substantive changes in medicaid effected by the Hyde Amendment, the State of Illinois must fund all "medically necessary" abortions, then held that P.A. 80-1091 was invalid to the extent that it did not provide the coverage to the extent of the Hyde Amendment. This holding and statement of law concerning state obligations under the medicaid program is wrong and inconsistent with the legislative history of medicaid, the express statements of members of Congress, and the language of Title XIX and its implementing regulations. The State of Illinois is permitted to make such adjustments in medicaid coverage if other conflicting state interests are involved or are adversely affected.

In conclusion, the Hyde Amendment and P.A. 80-1091 are spending enactments which easily withstand constitutional attack on all due process and equal protection grounds. The district court's holding of unconstitutionality resulted from a misuse of the concept of the legitimacy of state interests. As a consequence, the district court engaged in an essentially legislative function. Its decision must be reversed.

ARGUMENT

I.

INTRODUCTION

This is an appropriations case involving funding of social and economic programs. This case does not involve state infringement of the right to privacy. Thus, it is very different from the landmark abortion decisions handed down by this Court in *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1975), *Bellotti v. Baird*, 428 U.S. 132 (1975), and *Bellotti v. Baird*, U.S., 99 S.Ct. 3035 (1979). Those were all privacy cases involving state statutory provisions which unduly burdened the right to privacy by imposing penal sanctions on either the woman seeking an abortion or on her physician. The statutory provisions in those cases had the effect of making the act of abortion, in one set of circumstances or another, a crime. For example, in *Roe v. Wade* all abortions except to save the life of the mother were a crime; in *Doe v. Bolton* all abortions, except with certain indications, were a crime; in *Planned Parenthood v. Danforth* abortions on minors and married women, except with the requisite parental or spousal consent, were a crime; in *Bellotti v. Baird* abortions on minors, except with parental or judicial consent, were a crime.

The abortion funding restrictions at issue here do not in any way impose criminal or other legal sanctions upon the woman seeking or the physician performing an abortion. They do not impose burdens on the decision to abort or on its effectuation. *Maier v. Roe*, 432 U.S. 464, 474 (1977).

This is an appropriation of funds case. It is a case about money—money now being provided for abortion in Illinois. Contrary to the wishes of a majority of the American people as expressed in Congress through the Hyde Amendment and the majority of the people of the State of Illinois as expressed in its General Assembly through P.A. 80-1091.

This case presents a narrow statutory and four broad constitutional issues.

The first constitutional question asks whether, and if so to what extent, ought this Court reassign Congressional and state legislative budgetary priorities. This issue has two branches: a political question branch and a judicial restraint branch.

The second constitutional issue asks whether this case has already been totally resolved by *Maier v. Roe* and *Poelker v. Doe*, 432 U.S. 519 (1977), and is thus foreclosed from further constitutional consideration.

The third constitutional issue asks whether there is a substantive right to public funding for abortion, either because of the nature of abortifacient freedom or because of a possible right to social welfare for health purposes.

The fourth issue deals with equal protection aspects of this case—specifically, whether the manner in which social welfare for medical purposes is dispensed under federal and state medicare programs violates equal protection.

The statutory question asks whether the federal medicaid scheme requires the participating states to fund abortions to the extent of the Hyde Amendment, or in all situations which a physician may deem abortion "medically necessary."

Since the district court held the Hyde Amendment and its Illinois counterpart, P.A. 80-1091, unconstitutional on equal protection grounds, the major emphasis of this Brief has been placed on the equal protection aspects of this case.

II.

MAHER v. ROE AND POELKER v. DOE HAVE RESOLVED ALL SIGNIFICANT CONSTITUTIONAL QUESTIONS AGAINST THE PLAINTIFFS

In *Maier v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977), this Court used the terms "nontherapeutic" and "therapeutic." The district court construed "nontherapeutic" to mean "purely elective" abortion and "therapeutic" to mean "medically necessary" to improve health. *Zbaraz v. Quern*, 469 F.Supp. 1212, 1219 (N.D.Ill. 1979). As a result of its misinterpretation of "therapeutic," the district court believed that the *Maier* and *Poelker* cases dealt only with the constitutionality of abortion funding restrictions that precluded funding for "purely elective" abortions, as opposed to the so-called "medically necessary" abortions. Accordingly, the lower court concluded that *Maier* and *Poelker* did not dispose of the issue of "health" related abortion presented here. (Intervenors emphatically deny that the Hyde Amendment and P.A. 80-1091 result in significant health problems for pregnant women, because there exist effective and safe

alternative treatments which are publicly funded under Medicaid.)

However, a careful study of the *Poelker* and *Maier* decisions reveal that there is no sound basis for distinguishing those decisions from the instant case, and that all significant constitutional issues presented here have been thoroughly considered by this Court and resolved against plaintiffs.

In *Maier* this Court concluded that there was no fundamental right to a state supported abortion or to have the state "pay for any pregnancy related expenses," *Maier v. Roe*, 432 U.S. at 469. This principle is applicable here, unless one somehow has a constitutional right to a publicly funded abortion if "health" could thereby be improved. However, *Maier* also held that there is no "constitutional obligation to pay *any* of the medical expenses of indigents." *Maier v. Roe*, 432 U.S. at 469 (emphasis added). It thus follows that there is no fundamental constitutional right to have the State pay for any medical procedure, including abortions, even if the abortion may improve health. Indeed, if this Court in *Maier* had believed that only a "purely elective" abortion were at issue, as opposed to one for which "health" may somehow be improved (i.e., a so-called "medically necessary" abortion), there would have been no reason for this Court to begin its analysis of the *Maier* case with the premise that there is no "constitutional obligation to pay any of the medical expenses of indigents." *Id.* There would have been no reason for that analysis to go beyond the narrow circumstances of a "purely elective" abortion situation. *Maier* dealt with the broader question of constitutional obligations to fund health related expenses and concluded that no such obligation existed under the Constitution.

Poelker v. Doe, 432 U.S. 519 (1977), announced by this Court with *Maher*, reinforces this interpretation of *Maher*. Upheld in *Poelker* was the policy of the Mayor of St. Louis prohibiting abortions in city hospitals "except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520. It was the constitutionality of this very restrictive policy that came before this Court in the *Poelker* case, not a policy which precluded only non-health related abortion from being performed in city hospitals. Indeed, the Circuit Court opinion had indicated that Mayor Poelker understood the policy to allow abortion in city hospitals only if the life of the mother was endangered. *Doe v. Poelker*, 515 F.2d 541, 552 (8th Cir. 1975). This policy was then far more restrictive than the standard of "medical necessity" that the plaintiffs now urge on this Court.

A careful study of the facts of the *Poelker* case reveals that the plaintiff Jane Doe did not seek an "elective" abortion, but rather a "medically necessary" or "health" related abortion. Support for this is found in the affidavit submitted by plaintiff Jane Doe in support of her Complaint and in her Respondent's Brief submitted to this Court in *Poelker v. Doe*. Her affidavit stated:

* * * that the ordinary and routine medical procedure in her situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, * * *.

Paragraph 8, of Jane Doe's Affidavit, quoted in Brief of Petitioner Mayor Poelker at 14, submitted to this Court in *Poelker v. Doe*, No. 75-442, Oct. Term, 1976 (emphasis in original).

The present and real threat by defendants to implement and enforce the policy herein challenged deters

said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

Id. at para. 9.

Respondent Jane Doe's Brief alleged that "Respondent Doe's medical record indicates confirmed cervical fibroid tumors, polyps, vaginitis, erythema, trichomycosis and an extremely retroverted uterus." Brief of Respondent Jane Doe, at 6, submitted in *Poelker v. Doe*, No. 75-442, October Term 1974. See also *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). Mayor Poelker claimed, in response, that Jane Doe had no medical need for an abortion. Indeed, the dispute of facts which this Court found "unnecessary to describe or resolve this conflict" (*Poelker v. Doe*, 432 U.S. at 520 n. 1) were exactly opposite to those understood by the district court, i.e., that Jane Doe claimed to seek an "elective" abortion.² In light of Jane Doe's claim that she had a medical need for the abortion and Mayor Poelker's claim that she did not, it would have been logically and legally necessary to make a finding that Mayor Poelker's version of the facts was correct if this Court had believed a distinction between "health" related abortions and "purely

² At *Zbaras v. Quern*, 469 F.Supp. at 1219 n. 9, the district court concluded that the plaintiff in *Poelker* had "no medical reasons to justify abortion," such as "severe sickness of the patient," citing from the Eighth Circuit Court of Appeals decision in *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). The district court apparently misunderstood the Eighth Circuit's point as well as the point of the physicians who examined Jane Doe. What was meant by both the Eighth Circuit and the examining physicians was that there were "no medical reasons" for which an abortion *would be permitted in the city hospitals of St. Louis*, not that Jane Doe's proposed abortion was "purely elective." The reference to "severe sickness of the patient" was made to indicate the nature of a medical problem for which an abortion *might* be allowed in the city hospitals.

elective" abortions was constitutionally significant, as the district court in this appeal assumed. The reason it was "unnecessary to [decide the dispute of facts] to . . . resolve this conflict" is because the *Maher* holding, which was applied to resolve the *Poelker* case (*Poelker v. Doe*, 432 U.S. at 520), also resolved the case against Jane Doe, regardless of whether or not her abortion was "medically necessary." In short, the state of Jane Doe's health was constitutionally irrelevant:

We agree that the constitutional question presented here is identical in principle with that presented by a state's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in *Maher v. Roe*. . . . For the reasons set forth in our opinion in that case, we find no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

Poelker v. Doe, 432 U.S. at 521.

Moreover, even if Jane Doe did not personally suffer from the health problems alleged, as claimed by Mayor *Poelker*, it is important to note that she represented a class of woman who sought abortions in the city hospital for both health and elective reasons. Thus, the exact nature of her medical problems had no particular legal significance.

If *Poelker* and *Maher* are read in light of this Court's holding in *Doe v. Bolton*, 411 U.S. 179 (1973), further support of this interpretation of *Maher* and *Poelker* is found. In *Bolton*, this Court struck down a number of provisions of the Georgia "reform" abortion statute, but explicitly upheld that part of a criminal statu-

tory provision which permitted abortion only when "based upon [the physician's] best clinical judgment that an abortion is necessary." *Doe v. Bolton*, 410 U.S. at 192. It follows that abortions not necessary in the "best clinical judgment" of the physician could be proscribed. The "clinical judgment of the physician" is a judgment related to the "health" of the patient, since a physician's expertise can only be assumed to relate to health improvement. *Id.* Consequently, all "right to privacy" abortions are "health" related abortions, and the so-called "purely elective" abortions, which the district court equated with "nontherapeutic" abortion, does not fall within the constitutionally protected zone of privacy. If this Court intended "nontherapeutic" as used in *Maher* and *Poelker* to mean "purely elective," then the *Maher* and *Poelker* decisions stand for the self-evident proposition that the State does not have to pay, under its medicaid program, for acts which the state may constitutionally declare illegal. Such a ruling would be jurisprudentially and constitutionally meaningless and could not have inspired the vigorous dissents of *Maher* and *Poelker*. One can only conclude that "nontherapeutic" as used by this Court in *Maher* and *Poelker* had a much broader meaning than that given to it by the district court.

Further support for this interpretation of the meaning of "nontherapeutic" as used by this Court in *Maher* is found in *Beal v. Doe*, 432 U.S. 438 (1977). In *Beal*, this Court wrote that "when Congress passed Title XIX in 1965, *nontherapeutic* abortions were unlawful in most states" (*Beal v. Doe*, 432 U.S. at 447 [emphasis added]), and noted that even at the time of "*Roe* . . . at least 30 states had statutory prohibitions against nontherapeutic abortion. *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973)." *Beal v. Doe*, 432 U.S. at 447 n.12. Almost all of the

criminal abortion statutes to which this Court referred precluded abortion unless necessary to save the life of the mother. See George, *Current Abortion Laws: Proposal and Movements for Reform*, 17 WEST. RESERVE L. REV. 371, 375-379 n. 21-24, 31, 43, 44, 45 (1965).

Four federal courts have agreed with this interpretation of the meaning of nontherapeutic: *D.R. v. Mitchell*, 456 F. Supp. 609 (D. Utah 1978); *Woe v. Califano*, 460 F.Supp. 234 (S.D. Ohio 1978); *Doe v. Mundy*, 441 F.Supp. 447 (E.D. Wis. 1977). Further, this Court vacated the judgment of the lower court preliminarily enjoining the Hyde Amendment in *McRae v. Califano*, 433 U.S. 916 (1977), a decision apparently based on this understanding of nontherapeutic.

The only additional questions raised below dealt with the Equal Protection Clause. *Maher* however has resolved those as well. First, indigency is not a suspect class. *Maher v. Roe*, 432 U.S. at 470-71. The fact that a physician deems an abortion "medically necessary" surely does not thrust the woman into a "suspect class" for equal protection analysis. Second, withholding of funds for abortion does not "penalize" the abortion decision. *Maher v. Roe*, 432 U.S. at 474. The fact that a physician may deem an abortion "medically necessary" surely does not make "penal" an otherwise non-penal statute. Third, promotion of the state's interest in childbirth over abortion with a funding and welfare policy does not violate equal protection. *Maher v. Roe*, 432 U.S. at 469-70. The fact that a physician may deem an abortion "medically necessary" surely does not alter the fundamental authority of the legislature to select and pursue with its limited resources those interests of state which at any given time appear to be most essential.

It thus follows that this case does not present a single significant constitutional issue not resolved against plaintiffs in *Maher* and *Poelker*.

III.

ABORTION FUNDING RESTRICTIONS ON HEALTH WELFARE PROGRAMS ARE A PROPER EXERCISE OF LEGISLATIVE SPENDING POWER AND THE JUDICIARY SHOULD DEFER TO LEGISLATIVE DISCRETION IN SUCH SPENDING MATTERS

Federal welfare programs, like the Medicaid Title, are enacted pursuant to the taxing power of Congress (U.S. CONST. art. 1, §8), its appropriations power (U.S. CONST. art. I, §9, cl. 7), its power to promote the general welfare (U.S. CONST. art 1, §8, cl. 1), as well as its power under the "necessary and proper clause" (U.S. CONST. art. 1, §8, cl. 8). The Hyde Amendment represents a congressional decision *not to spend money* for abortion in federal social welfare programs, since to do so would vitiate other state interests. The power to spend is a constitutionally delegated power of Congress. It is not a constitutionally required obligation. How this power is exercised is a matter for Congress to determine.

Appropriation matters are essentially political in nature,³

³ The Hyde Amendment has been the subject of extremely protracted and heated debate in Congress. See:

122 CONG. REC. H 6647-6661 (daily ed. June 24, 1976);
 122 CONG. REC. S 10787-10807 (daily ed. June 28, 1976);
 122 CONG. REC. H 8631-8641 (daily ed. August 10, 1976);
 122 CONG. REC. S 14562-14570 (daily ed. August 25, 1976);
 122 CONG. REC. H 10312-10318 (daily ed. September 16, 1976);
 122 CONG. REC. S 16112-16121 (daily ed. September 17, 1976);
 122 CONG. REC. S 17296-17302 (daily ed. September 30, 1976);
 123 CONG. REC. H 6082-6098 (daily ed. June 17, 1977);
 123 CONG. REC. S 11041-11056 (daily ed. June 29, 1977);
 123 CONG. REC. H 8327-8353 (daily ed. August 2, 1977);
 123 CONG. REC. S 13668-13678 (daily ed. August 4, 1977);

(footnote continued)

are best resolved by the legislature, and are not suited to judicial review. In *Baker v. Carr*, 369 U.S. 186 (1962), this Court discussed in some detail the nature and applicability of the doctrine of nonjusticiability or the political question doctrine, concluding that "it is the relationship be-

(footnote continued)

- 123 CONG. REC. H 10128-10134, 10170 (daily ed. September 27, 1977);
 123 CONG. REC. H 10829-10838 (daily ed. October 12, 1977);
 123 CONG. REC. H 10966-10970 (daily ed. October 13, 1977);
 123 CONG. REC. S 17900-17902 (daily ed. October 27, 1977);
 123 CONG. REC. S 18584-91, S 18621-22 (daily ed. November 3, 1977);
 123 CONG. REC. H 12167-12175 (daily ed. November 3, 1977);
 123 CONG. REC. S 19236-19240 (daily ed. November 29, 1977);
 123 CONG. REC. H 12485-12494 (daily ed. November 29, 1977);
 123 CONG. REC. H 12651-12658 (daily ed. December 6, 1977);
 123 CONG. REC. H 12770-75, H 12929-31 (daily ed. December 7, 1977);
 124 CONG. REC. H 5363, H 5371 (daily ed. June 13, 1978);
 124 CONG. REC. H 10798-10800 (daily ed. September 26, 1978);
 124 CONG. REC. S 16312-16338 (daily ed. September 27, 1978);
 124 CONG. REC. H 11493-97 (daily ed. October 4, 1978);
 124 CONG. REC. H 12468-87, H 12516-20 (daily ed. October 12, 1978);
 124 CONG. REC. H 12969-75 (daily ed. October 14, 1978);
 125 CONG. REC. H 5253-5262 (daily ed. June 27, 1979);
 125 CONG. REC. S 9851-9873 (daily ed. July 19, 1979);
 125 CONG. REC. S 13253-55 (daily ed. September 24, 1979);
 125 CONG. REC. S 13573-75 (daily ed. September 27, 1979);
 125 CONG. REC. S 13736-43 (daily ed. September 28, 1979);
 125 CONG. REC. H 8856-58 (daily ed. October 9, 1979);
 125 CONG. REC. S 14325 (daily ed. October 10, 1979);
 125 CONG. REC. H 9884-86 (daily ed. October 30, 1979);
 125 CONG. REC. S 16710-14 (daily ed. November 15, 1979);
 125 CONG. REC. H 10955-59 (daily ed. November 16, 1979);
 125 CONG. REC. S 16882-83 (daily ed. November 16, 1979);
 125 CONG. REC. H 11614-11623 (daily ed. December 6, 1979);
 125 CONG. REC. H 11770-76 (daily ed. December 11, 1979).

tween the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the political question." *Baker v. Carr*, 369 U.S. at 210. To determine if that doctrine should be invoked, this Court set forth certain guidelines:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217.

Although the issues presented to this Court here are different from those in *Baker*, which upheld the justiciability of legislative reapportionment, at least some of the "tests" for determining whether to apply this doctrine are applicable here and should guide this Court in its review of the judgment of Congress involved in this case.

For example, in this case there is a "textually demonstrable constitutional commitment of the issue" of the appropriations power to Congress, "a coordinate political department" under Article I, §9, cl. 7 of the U.S. Constitution. There is a "lack of judicially discoverable and manageable standards" for determining which, and to what extent, the State can most wisely promote and protect with its limited resources the various and conflicting legitimate state interests involved in the abortion decision. There is the "impossibility of deciding, without an initial policy

determination of a kind clearly for nonjudicial discretion" which of the various conflicting legitimate state interests at stake in abortion should be preserved. There is the "impossibility of undertaking independent resolution" of the issue of whether the courts should promote the health of citizens—if indeed "health" is significantly endangered—rather than other important and legitimate state interests "without expressing lack of respect due coordinate branches of government." Finally, there is the "potentiality of embarrassment from multifarious pronouncements by various departments" (here, from the Congress and the judiciary) "on one question": how various legitimate, perhaps competing, state interests should be promoted with the resources available to the State. Clearly, many of the tests for invocation of the political question doctrine are satisfied here.

This Court has very broad powers of judicial review and may well decide this case is justiciable. *Cf. United States v. Lovett*, 328 U.S. 303, 313 (1945). However, even if the close relationship between this case and "political question" cases does not counsel a finding of nonjusticiability, it certainly counsels judicial restraint, a low level of judicial review, and judicial deference to appropriations decisions of Congress.

This Court has held that the President has no power to impound funds which Congress has expressly directed to be spent. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). See also *Train v. City of New York*, 420 U.S. 35 (1975). Such decisions promote respect for and protect separation of powers and our system of checks and balances. Nothing less is at stake here.

This Court, as far as can be determined, has never held an Appropriations Act of Congress invalid either under strict scrutiny or under the rational relationship test. There are important reasons which counsel this Court against

establishing such a precedent in this context. The various demands which the Congress makes upon the Treasury to further and protect valid governmental interests should not be subject to judicial review merely because an individual physician believes a particular medical procedure is "necessary."

As Mr. Justice Stewart, writing for this Court, stated in *Dandridge v. Williams*, 397 U.S. 471, 478 (1969),

[t]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public funds among the myriad of potential recipients.

IV.

THERE IS NO CONSTITUTIONAL RIGHT TO PUBLIC FUNDING FOR ABORTIONS OR TO SOCIAL WELFARE FOR HEALTH PURPOSES

In *Maher v. Roe*, 432 U.S. at 469, this Court held that there is no constitutional right to public funding for abortion or for any medical expense. This issue is thus foreclosed from further constitutional debate, and the district court appears to have agreed. *Zbaraz v. Quern*, 469 F.Supp. at 1217.

Nonetheless, several different reasons suggest it is necessary to discuss the substantive, due process aspects of this case: 1) despite its explicit language, the district court's decision may have been premised in part on a belief that there is a substantive right to welfare for medical expenses;⁴ 2) equal protection analysis⁵ is occasionally re-

⁴ Although the district court claimed its decision was based on equal protection grounds, *Zbaraz v. Quern*, 469 F.Supp. at 1218, it did emphasize the "pregnant woman's interest in her health. . . ." *Id.* 1221.

⁵ Sometimes referred to as "substantive equal protection." See, e.g., Tussman and tenBroek, *The Equal Protection of the Law*, 37 CALIF. L. REV. 341 (1949).

lated to substantive due process rights (e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 [1968]); 3) the nature of the right to privacy and the non-existence of a general constitutional right to welfare for medical purposes provide background for the discussion of the equal protection issues raised in this case; 4) in order to establish the inapplicability of "strict scrutiny" as the appropriate standard for judicial review, a thorough discussion of the due process aspects of this case is indicated.

A. The Essential Nature of Constitutional Privacy Is Freedom from Governmental and State Interference and Intrusion in One's Private Sphere, Not a Right to Public Involvement and Support.

In *Roe v. Wade*, 410 U.S. at 152, this Court announced that "a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution," and held that "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. Aspects of abortion thus fall within the sphere of constitutionally protected privacy.

The right to privacy, by its very nature, is a "non-interference" right. At common law it protects the individual from interference or invasion from others. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). As a constitutional right, it protects the individual from interference through state action. For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court struck down a state statute making use of contraceptives a crime because the statute invaded "the zone of privacy." *Id.* at 485. If the statute were upheld, "the police [would be allowed] to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives." *Id.* at 485-86.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court noted that "if the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted *governmental intrusions* into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (Emphasis added.)

In *Stanley v. Georgia*, 394 U.S. 557 (1969), a case involving possession of obscene materials, this Court noted that the right to receive information and ideas "takes on an added dimension" in the context of a prosecution for possession of something in one's own home" since "also fundamental is the right to be free, except in very limited circumstances, from *unwarranted governmental intrusions* to one's privacy." *Id.* at 564 (emphasis added).

In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court tested the constitutionality of a New York statute which required that the names of persons who obtained prescribed drugs be recorded. The challenge was based on the theory that the statute violated constitutionally protected rights of privacy. In examining the scope of constitutional privacy, Mr. Justice Stevens, writing for a unanimous Court, noted that "cases sometimes characterized as protecting 'privacy' have in fact involved two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-99. In this regard, the Court quoted Professor Philip Kurland:

The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual

not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion. The private I, the University of Chicago Magazine 7, 8 (autumn 1978). The first of the facets which he describes is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interest referred to in the text.

Whalen v. Roe, 429 U.S. at 599.

These cases all illustrate the principle that constitutional privacy protects the individual's zone of privacy from state intrusion. The Constitution protects certain private activities from the State. It creates no obligation to implement the exercise of such activities.

There is no "right to an abortion," only a right of privacy "which is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. This point was emphasized in *Maier v. Roe*, 432 U.S. 464 (1977), where this Court noted that the district court "read our decisions in *Roe* . . . as establishing a fundamental right to abortion. . . . We think the District Court misconceived the nature and scope of the fundamental right recognized in *Roe*." *Id.* at 471.

Even if this Court ignores precedent and holds that there is a relationship between the right to privacy and governmental appropriations, it does not follow that abortion must be funded. In *Shapiro v. Thompson*, 394 U.S. 618 (1968), this Court held that a constitutional right exists to travel interstate. *Id.* at 630. But, as this Court noted in *Maier*, the existence of this right does not require the State to provide bus tickets to indigent citizens to enable them to effectuate a decision to travel.

Maier v. Roe, 432 U.S. 464, 475 n.8. Similarly, the State need not assist a pregnant woman to effectuate her abortion decision.

As Chief Justice Burger's concurring opinion in *Maier v. Roe* makes clear, the "Court's holdings in *Roe v. Wade* . . . and *Doe v. Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion. These precedents do not suggest that the State is constitutionally required to assist her in procuring it." *Maier v. Roe*, 432 U.S. at 481.

The incongruity implicit in the district court's decision that certain abortions must be publicly funded is that a constitutional freedom from state intrusion into zones of *privacy* is thence transformed into a right to *public* support and *public* involvement in such private matters. The district court's decision is premised on the notion that a right of non-interference by the State in the zone of individual privacy requires, in addition, state action to effectuate private decisions about private matters. This is quite inconsistent with the basic notion and tradition of the right to privacy.

If constitutional privacy precludes the state from interfering with one's decision to educate one's children in Germanic language skills (*Meyer v. Nebraska*, 262 U.S. 390 [1923]), or to send one's child to a private school (*Pierce v. Society of Sisters*, 268 U.S. 510 [1925]), does it require the State to pay for the teacher of German? Or to fund the private school? (Cf. this Court's use of the *Meyer* and *Pierce* analogy to abortion funding in *Maier v. Roe*, 432 U.S. at 476-77). If constitutional privacy precludes the state from criminalizing the use of contraceptives (*Griswold v. Connecticut*, 381 U.S. 479 [1965]), does it require the State to pay for contraceptives? If constitutional privacy precludes the State from punishing the

use of obscene materials in the home (*Stanley v. Georgia*, 394 U.S. 557 [1969]), does it require the State to provide public funding for obscene materials? If constitutional privacy precludes the State from interfering with the abortion decision (*Roe v. Wade*, 410 U.S. 113 [1973]), does it require the State to provide public funding for abortion? This Court in *Maier v. Roe* unequivocally answered this question in the negative.

Surely, the answers to these questions would not differ if the teacher of German would deem German "educationally necessary," or a school counselor would deem contraceptives "socially necessary," or a mental health professional would deem pornography "psychologically necessary." Yet, under the district court's theory, the existence of this "necessity" somehow transforms the nature of the right to privacy from a right of non-interference by the State into a right which imposes an affirmative obligation on the State to act.

To require, as a matter of constitutional law, public involvement into these private matters would be inconsistent with the basic notion, as well as the logic and tradition, of constitutional privacy. Privacy neither means nor implies State involvement. If anything, it suggests its impropriety.

B. There Is Neither a Constitutional Right of Indigents to Receive Nor a Constitutional Obligation on the States or Federal Government to Pay the Medical Expenses of Indigents.

In *Maier v. Roe*, 432 U.S. 464 (1977), this Court dealt directly with the question of the existence of due process rights to medical welfare payments and the existence of a state obligation to provide medical welfare to indigents. This Court, through Mr. Justice Powell, wrote:

The Constitution imposes no obligation to pay the pregnancy related expenses of indigent women, or indeed to pay any of the medical expenses of indigents.

Id. at 469.

This principle is perfectly consistent with past decisions of this Court. For example, in *Dandridge v. Williams*, 397 U.S. 471 (1969), this Court recognized that the "administration of public welfare assistance . . . involves the most basic needs of impoverished human beings" (*Id.* at 485), but nonetheless held that

the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

Id. at 487.

The *Maier* holding is also consistent with *Boddie v. Connecticut*, 401 U.S. 371 (1971), which this Court distinguished on the basis of Connecticut's monopoly over the means to dissolve marriages legally. See also *United States v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410 U.S. 656 (1973) (*per curiam*). Since it is clearly settled that there is no constitutional right to free medical treatment, regardless of the seriousness of the medical problem, and since neither the State of Illinois nor the federal government monopolizes the means for terminating pregnancies, further discussion of due process rights of indigents for social welfare or any constitutional obligations of states to provide welfare for medical treatment is unnecessary.

To the extent the decision of the district court is based on any notion of a substantive constitutional right which obligates the federal government or state to provide welfare for abortions or for any medical expenses, it is wholly in error.

V.

NEITHER THE HYDE AMENDMENT NOR ITS ILLINOIS COUNTERPART, P.A. 80-1091, CONFLICT WITH EQUAL PROTECTION PRINCIPLES OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION.

After concluding in *Maher v. Roe*, 432 U.S. 464 (1977), that the "Constitution imposes no obligation on the States . . . to pay any of the medical expenses of indigents" (*Id.* at 469), this Court emphasized that "when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Id.* at 469-70.

The constitutional limitations to which this Court referred are obviously those imposed by the Equal Protection Clauses of the Fifth and Fourteenth Amendments. Both the Hyde Amendment and P.A. 80-1091 satisfy all applicable analytical tests developed by this Court to evaluate constitutionality under equal protection principles.

In the course of the following analysis it will be assumed that the principles which flow from the Equal Protection Clause of the Fourteenth Amendment are identical to the principles of equal protection of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); Karst, *The Fifth Amendments Guarantee of Equal Protection*, 55 N.C.L. REV. 540 (1977).

When confronted with an equal protection issue, "[T]he Courts must reach and determine the question whether the classifications drawn in the statute are reasonable in light of its purpose . . ." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). This Court has stated the basic framework for equal protection analysis:

We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination.

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Accord *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 314 (1976). Cited with approval and followed, *Maher v. Roe*, 432 U.S. at 470.

The order of analysis will be reversed here, since the district court rejected strict scrutiny as the appropriate standard for judicial review and based its holding on its understanding of legitimacy of state interests. First, the legitimacy of the legislative purposes served by the federal and state funding restrictions will be discussed. Second, the rationality of the means of achieving that purpose will be discussed. Later in this Brief, the inapplicability of "strict scrutiny" as the standard of judicial review will be discussed.

A. Legitimacy.

1. The Purposes of the Hyde Amendment and P.A. 80-1091 Are Legitimate.

The purposes of the abortion funding restrictions are several: protection of fetal life, encouragement of childbirth, recognition of public morals, resolution of demographic concerns, and preservation of fiscal integrity. Each of these state goals is legitimate. Since a major conceptual error of the district court was its misuse of legitimacy, only legitimacy will be discussed here. The rationality of the abortion funding restrictions as a means of achieving the legitimate goals will be discussed separately.

a) The Protection of Fetal Life.

The sponsor of the original HEW Labor Abortion funding restriction, U.S. Representative Henry Hyde, stated that the purpose of this law was to "protect that most defenseless and innocent of human lives, the unborn . . ." 122 *Cong. Rec.* 20410 (1976).

In its landmark abortion decision in *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that the state has "important and legitimate interest in protecting the potentiality of human life." *Id.* at 162. This point has been repeated frequently in subsequent abortion decisions. See *Colautti v. Franklin*, — U.S. —, 99 S. Ct. 675, 681 (1979); *Beal v. Doe*, 432 U.S. 438, 446 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 423 U.S. 52, 61 (1975).

In *Maher v. Roe*, this Court referred to the State's "interest in the . . . potential life of the fetus," (432 U.S. at 472); once to the state's "direct interest in protecting the fetus," (432 at 478 n. 11); and once to the state's "strong interest in protecting the potential life of the fetus." 432 at 478. Distinguishing abortion from other medi-

cal procedures, this Court emphasized that "[other] medical procedures do not involve the termination of potential human life." *Maher v. Roe*, 432 U.S. at 480. Indeed, this Court's decision in *Maher* upholding the Connecticut abortion funding restriction was necessarily based on its holding that the state's interest in the human fetus is legitimate.

In none of these decisions did this Court limit the legitimacy of the state's interest to the viable human fetus. In *Roe v. Wade*, as well as in *Maher v. Roe*, this Court held that the "interest [in protecting the potential life of the fetus] exists throughout the pregnancy, 'grow[ing] in substantiality as the woman approaches term'." *Roe v. Wade*, 410 U.S. at 162-163; *Maher v. Roe*, 432 U.S. at 478. In *Maher*, the abortion funding restriction at issue was upheld although it applied to all stages of pregnancy. This is only possible if the state's interest in the fetus is legitimate throughout all of pregnancy. Nonetheless, the district court held that if the "pregnant woman's interest in her health" is in conflict with the "state's interest in the non-viable fetus . . . the state's interest is not legitimate." *Zbaraz v. Quern*, 469 F.Supp. at 1221.

This use of the concept of legitimacy is totally incorrect. See this Brief at V, A. Once an interest of state is legitimate, it remains legitimate. It does not lose its legitimacy because a court believes that the State ought to have decided to promote a different legitimate interest. Legitimacy is not determined by balancing state interests, one against the other.

b) The Encouragement of Childbirth⁶

This Court has held: 1) that the right of privacy "implies no limitation on the authority of the state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds" (*Maher v. Roe*, 432 U.S. at 474); 2) that the State "unquestionably has a 'strong and legitimate interest in encouraging normal childbirth'" (432 at 478, quoting from *Beal v. Doe*, 432 U.S. 438, 446 (1977)); 3) held the state's interest in encouraging normal childbirth exceeds the level required to satisfy the rational basis test (432 at 479); and 4) that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . ." *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

c) The Recognition of the Moral Precepts and Consciences of the American People.

In both the U.S. Congress and in the Illinois General Assembly, one of the reasons articulated in support of the abortion funding restrictions was to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. For example, Senator James Buckley, in support of the Hyde Amendment, stated that Congress should not permit federal funds to be disbursed for a "procedure that appalls the conscience of a very substan-

⁶ Although the state's interest in prenatal human life and its interest in "childbirth" have both fiscal and demographic importance, the two interests are sufficiently different to justify separate treatment. In addition to the fiscal and demographic impact of increased and decreased birthrates, the state's interest in prenatal human life can be justified additionally by the *raison d'être* of the State to protect the unalienable rights of man, among which is life. See, e.g., the Declaration of Independence.

tial percentage of the American taxpayers." 122 CONG. REC. 20410 (1976). Senator Bartlett said, "I just do not think . . . we should feel we have a right or an obligation to finance abortions, which are simply considered an anathema by many, many people in this country." 122 CONG. REC. 27679 (1976).

In the Illinois General Assembly, Senator Lemke, Senate sponsor of P.A. 80-1091 stated:

My people don't want abortions being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly, as long as its properly used.

Illinois Senate, *Transcript of Debate on H.B. 333*, June 27, 1977. A. 82.

Respect for the consciences and moral precepts of its citizens has always been considered a legitimate end of state.

d) The Fiscal and Demographic Interests of the State.

The House sponsor of the Illinois abortion funding restrictions, Representative Harold Leinenweber, articulated a fiscal and demographic basis for the Hyde Amendment and P.A. 80-1091:

Another compelling reason for the statute, I think we should look to the fact that we are now in the State of Illinois and elsewhere, at below zero population growth. I would suggest to you that it is a very sound fiscal reason for the state not to encourage the destruction of its unborn, and that is, to consider the fact that when those of us reach retirement age, that we have some children left to supply the money to pay for our retirement and to take care of us.⁷

⁷ Illinois House of Representatives, *Transcript of Debate on H.B. 333*, November 3, 1977. A. 65.

Certainly, the fiscal and demographic interests of the State may be considerable in this regard. As this Court stated in *Shapiro v. Thompson*, 394 U.S. 618 (1968), the federal government and the States have "a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program." *Id.* at 633. In addition this Court observed in *Maher v. Roe*:

[A] State may have legitimate demographic concerns about its population growth. Such concerns are basic to the future of the state and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.⁸

2. "Legitimate State Interests" in Constitutional Law.

In the jurisprudence of this Court, "legitimacy" is a concept used to describe those goals and interests which the State may pursue or protect under the Constitution.

Illegitimacy refers to the constitutional impermissibility of an explicitly or implicitly articulated goal or interest of state. For example,

... the purpose of inhibiting migration by needy persons into the state is constitutionally impermissible.

Shapiro v. Thompson, 394 U.S. 618, 629 (1968).

If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them it [is] patently unconstitutional.

⁸ 432 U.S. at 478 n.11. See also *Id.* at 481, where Chief Justice Burger noted that "[e]ncouragement of childbirth and childcare is not a novel undertaking. . . . Various governments, both in this country and in others, have made such a determination for centuries."

United States v. Jackson, 390 U.S. 570, 581 (1968).

This Court has never held that a legitimate state interest ceases to be legitimate. The constitutional question has always been whether or not the means employed to protect a "legitimate state interest" are irrational or unduly burden fundamental rights. See, e.g., *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973), *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 314 (1976), *Maher v. Roe*, 432 U.S. 464, 470 (1977). Thus, an enactment may be constitutionally invalid, yet the interest it promotes and protects remains legitimate. A legitimate state interest does not cease to be legitimate because a court would have ordered the priority of state interests differently than the legislature.

Thus, a physician's judgment that an abortion is "medically necessary" does not "delegitimize" the states' legitimate interests in prenatal human life and childbirth, or in respecting the moral values of American taxpayers, or in demographic and fiscal matters.

If the legitimacy of state interests are to be determined by balancing the relative import of various state interests, as the lower court believed, a new and radical concept which would have a profound impact on the American system of government would be incorporated into constitutional law. Under the guise of determining the legitimacy of state interests, the judiciary could substitute its views about the desirability of a given interest or goal of state for that of the legislature. Accordingly, if a court believed that a different interest of state ought to have been pursued, it could declare the interest actually pursued "illegitimate". And this could be done without even asking whether the legislation infringes upon fundamental rights, or whether it has a rational or compelling basis. This is

precisely the error of the district court. It disagreed with the order of budgetary priorities set by Congress and the Illinois General Assembly, and condemned this order by concluding that an otherwise legitimate state interest ceases to be legitimate when it conflicts with another judicially preferred interest.

3. The Trial Court's Misuse of the Concept of Legitimate States Interests.

Three times in the course of its short opinion, the district court indicated its misunderstanding and misuse of the concept of legitimate state interest. The court wrote:

[the protection of the fetus] is a legitimate interest in some circumstances.

Zbaraz v. Quern, 469 F.Supp. at 1219.

Under *Mahe*r, a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary.

Id. at 1219.

We cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the risk of material morbidity and mortality among indigent women.⁹

Id. at 1220.

[A] pregnant woman's interest in her health so outweighs any state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate.

Id. at 1221.

⁹ Defendants do not agree there is increased mortality and morbidity. These quotes are used only to show how the trial court misunderstands and misuses the concept of legitimacy.

In every case the district court employs the concept of the "legitimacy" of a state interest to indicate the conclusion, rather than the starting point of its "equal protection analysis".¹⁰

Although the analytic framework employed by the district court is not apparent, its conclusion is clear: an otherwise "legitimate" interest of the United States and of the State of Illinois has somehow become "illegitimate". The reason assessed by the district court for the sudden illegitimacy of the state's interest is likewise apparent: the district court simply disagreed with the order of priorities established by the Congress and the Illinois General Assembly among several legitimate state interests, and condemned this order by concluding that an otherwise legitimate state interest has lost its legitimacy.

By declaring an otherwise legitimate state interest illegitimate because of its disagreement with the legislatures' order of budgeting priorities, the district court was able to hold a statute unconstitutional without even subjecting the laws before it to equal protection analysis. The notion of "legitimacy" became a guise by which the district court substituted its judgment for that of the Congress and the Illinois General Assembly. A clearer violation of principles of judicial restraint and deference to legislative judgments cannot be imagined.

Indeed, the district court reintroduced into law the sort of reasoning common to the *Lochner*-era, now under the guise of equal protection analysis. If the notion of the

¹⁰ In spite of the language of the district court's opinion, it is also possible that the district court believed that the state's interest in the fetus was illegitimate for due process reasons, i.e., conflict with a constitutional right to have the State make an effectuation of the abortion decision possible or to a right to welfare for health related reasons. Since neither of these due process rights exist, a decision based on such erroneous assumptions would be wrong.

"legitimate state interest" had been correctly used, the district court would have next asked whether the statute was enacted to further "legitimate interest", is rationally related to that interest, and whether it impinges upon fundamental rights or involves suspect classes thereby requiring "strict judicial scrutiny." If this established framework for equal protection analysis had been followed, the constitutionality of the Hyde Amendment and P.A. 80-1091 would have been apparent.

B. Rationality.

There appear to be two aspects to the question whether a statute rationally furthers legitimate interests: 1) whether the statute effectively achieves the legitimate purpose of state for which it was enacted; 2) whether in achieving those ends it involves classifications without a rational basis, i.e., invidious classifications.

Concerning the effectiveness of the abortion funding restrictions, little need be said. The ubiquity and variety of governmental fiscal programs to influence and regulate public and private behavior testify to their effectiveness. The abortion funding restrictions are no different than these other social and economic programs which are intended to further legitimate state interests.

The standard for determining whether the classifications in a challenged statute are rational has been announced by this Court on numerous occasions. Generally, this Court has upheld any legislative classification based upon any "state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy . . ." *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959). The Hyde Amendment and P.A. 80-1091 clearly satisfy this test.

All legislation involves classifications of some type. "The Constitution invalidates only that governmental choice

which is 'clearly wrong, a display of arbitrary power, not an exercise of judgment.' " Tribe, *AMERICAN CONSTITUTIONAL LAW* 997 (1978) quoting from *Mathews v. Natural Carbonic Gas Co.*, 429 U.S. 181, 185 (1976). "Mathematical nicety" is "not practicable or plausible." *Mathews v. de Castro*, 429 U.S. 181, 185 (1976), quoting from *Helvering v. Davis*, 301 U.S. 619, 640 (1937). "[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of the problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 487 (1969). "The problems of government are practical ones and may justify, if they do not require rough accommodations." *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69 (1913). *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). "Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it." *Home Insurance Co. v. New York*, 134 U.S. 594, 606 (1890).

The reasonableness of a classification is a relative matter, and can only be determined by comparing those who are affected by a statute with the ends to be accomplished by it. It involves essentially a means-end analysis.¹¹

Consequently, it is necessary to evaluate the Hyde Amendment and P.A. 80-1091 from the perspective of each of their several purposes: protection of prenatal human life, respect for the moral values of taxpayers, and promotion of fiscal and demographic interests. The lower court, however, failed to do this. Rather, it viewed the funding restrictions solely from one of the underlying purposes of medicaid—promotion of health. Since this

¹¹ See Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

may explain the lower court's erroneous decision, the rationality of the classifications from the perspective of medicaid is dealt with separately.

1. The Hyde Amendment and P.A. 80-1091 Rationally Further Legitimate State Interests in Fetal Life and Normal Childbirth and Employ Reasonable Classifications in Achieving This Legitimate End of State.

In *Maier v. Roe* this Court upheld a statute restricting public funds for abortion, finding that it "rationally furthered" the State's "strong and legitimate interest in encouraging normal childbirth an interest honored over the centuries." *Maier v. Roe*, 432 U.S. at 478. The Connecticut statute at issue in *Maier* funded only abortions which were "medically necessary" (see § 275(1) of the Connecticut statute, set forth in *Maier v. Roe*, 432 U.S. at 466, n.2.) The statutes at issue here fund abortions under a narrower standard, but this difference is of no constitutional importance. The effectiveness of the abortion funding restrictions in "furthering the legitimate state interest" in prenatal human life and childbirth is not lessened by the physician's opinion concerning the "medical necessity" of an abortion.

The Hyde Amendment and the P.A. 80-1091 impact primarily on the medicaid program. Any classification inherent in the medicaid program itself was fully before this Court in *Maier* and upheld.

2. The Hyde Amendment and P.A. 80-1091 Rationally Further the Legitimate State Interest in Respecting the Moral Values of the American People and Employ Entirely Rational Classifications to Achieve this Legitimate End of State.

As a consequence of the Hyde Amendment and P.A. 80-1091, taxpayers who are morally opposed to abortion will not be forced, contrary to their moral precepts, to fund abortion and thereby aid, either directly or indirectly, effectuation of abortion decisions. The Hyde Amendment and its Illinois counterpart have the effect of avoiding a moral "taint" which some citizens may feel if part of their income is used to promote an act they consider morally repugnant; they therefore rationally further the state's legitimate interest in respecting the moral precepts and the consciences of the American people.

From the perspective of the class of taxpayers who maintain strong moral sentiments for or against abortion, the classification is entirely rational, for there is nothing in these laws which precludes those who feel that abortion is a morally proper act to contribute their funds to hospitals, clinics, or physicians who perform abortions. All are permitted to act according to their consciences and to use their money as they deem fit. Without these laws, this would not be possible.

3. The Hyde Amendment and P.A. 80-1091 Rationally Further the Legitimate Fiscal and Demographic Interests of the State and Employ Rational Classifications to Achieve Those Ends.

Congress and the Illinois legislature could rationally conclude that the long term costs of childbirth are less than

similar costs for abortion. A detailed and heavily documented study¹² presents substantial evidence that the availability of free abortion tends to decrease contraceptive use and increase pregnancies to the point at which two or three abortions are necessary to avert one birth.¹³ When abortion is employed as a method of birth control, it is irrational merely to compare the cost to the government of a single abortion and a single birth. When the cost of abortion is multiplied by a factor which takes into account higher rates of pregnancy and lower contraceptive utilization, the cost of abortion may well exceed that of funding any births induced by the unavailability of medicaid reimbursement for abortions.¹⁴ There exists mounting evidence that abortion complications—both currently reported and projected—may lead to medicaid costs greatly in excess of those associated with pregnancy complications.¹⁵ Finally,

¹² Hardy, *Privacy and Public Funding, Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 ARIZ. L. REV. 903, esp. 924-933 (1977).

¹³ *Id.* at 927-929. See also Tietze and Dawson, *Induced Abortion: A Fact Book*, REPORTS ON POPULATION/FAMILY PLANNING (December 1973), at 6.

¹⁴ Hardy, *supra* n.12, at 932-933.

¹⁵ *Id.* In April 1977, Allmen, Cates, Jr., Schulz, Grimes and Tyler, Jr., of the HEW Public Health Service Center for Disease Control presented a paper, "Economic Benefits of Reducing Abortion Complications," at the EIS Conference, concluding: "The total direct cost of treating major and minor abortion complications is estimated at \$19.4 million in 1975." *Id.* at 4. The authors emphasized that the figure was undoubtedly underestimated. For example, "indirect costs, or opportunity costs of lost work days resulting from abortion morbidity, though undoubtedly significant, are not dealt with. . . ." *Id.* at 1. Other technical influences, all tending to make the estimate conservative, were detailed. *Id.* at 2, 3. The effects of a far larger number of abortions than in 1975, together with the future costs of long-term complications, may be expected to increase the estimate considerably.

the administrative burden imposed on health care facilities by the easy availability of free abortion is great.¹⁶

The district court erred by simply comparing the short term cost of abortion to childbirth to determine whether the fiscal interest of the state was served through abortion funding restrictions.¹⁷ The fiscal-demographic interest which motivated the Illinois legislature involved the *long-term* effects of abortion on the social and economic welfare of the population. See this Brief at 49-50. Thus, there is a rational basis from a fiscal and demographic perspective for the scheme of classification in the laws before this Court.

The Constitution does not require legislative bodies to adopt short term, middle term, or long term economic analyses in exercising their spending powers. If legislatures wish to expend large sums now to maximize benefits in the future, the courts should defer to that judgment. Is it wiser to build an efficient, long-lasting, and expensive road now? Or is it wiser to build a less expensive, less efficient, and temporary road, to free public funds to use to construct schools, hospitals, or court houses? Such decisions are made daily in the legislatures of this Nation, and they are qualified to deal with such problems. Courts are not.

¹⁶ Hardy, *supra* note 12, at 930-32.

¹⁷ *Zbaraz v. Quern*, 469 F.Supp. at 1218-1219:

While the allocation of limited public funds is a legitimate interest of state . . . , we do not believe that the Illinois funding policy is rationally related to this purpose. In fact, the record in this case supports the contrary conclusion that the costs of prenatal care, childbirth and post-partum care are substantially higher than the costs of abortions. . . . In short, P.A. 80-1091 was not, and could not be motivated by economic concerns.

C. Viewed from the Perspective of the Purposes of the Medicaid Program, the Legislative Classifications in the Hyde Amendment and P.A. 80-1091 Are Reasonable.

Since the district court erroneously saw the Hyde Amendment and P.A. 80-1091 only from the perspective of the medicaid program, rather than from the perspective of the other important and legitimate state interests involved, this legislative classification is considered separately. Any one of the rational bases we have described justifies legislative classifications in social welfare programs.

1. The District Court's Opinion.

The district court noted that the

principal argument [of plaintiffs] is that, by imposing restrictions on the public funding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 violates their rights to equal protection of the laws. . . .

Zbaraz v. Quern, 469 F.Supp. at 1216.

Later the district court held the Hyde Amendment and P.A. 80-1091 unconstitutional because "any possible state interest in the life of a non-viable fetus . . . is not legitimate" for a "woman medically in need of an abortion." *Zbaraz v. Quern*, 469 F. Supp. at 1221. Although the district court explained its ruling in terms of the illegitimacy of the state's interest in fetal life when in conflict with the woman's health, it may be that the district court's decision is actually based on what it erroneously believed to be an unreasonable classification in the medicaid program created by these abortion funding restrictions.

2. The Reasonable Bases for the Legislative Classification Created by the Abortion Funding Restrictions.

Abortion is a unique medical procedure. Since this is so, governments are justified in treating it differently in their medicaid programs.

i) Abortion Is a Unique Medical Procedure Since It Involves the Termination of Fetal Life.

In *Maier*, this Court reversed a decision of the lower court which had invalidated a state statutory requirement of prior written request by the pregnant woman and prior authorization by a Department of Social Services. With respect to the argument that such requirements were not imposed for other medical procedures, this Court wrote that "the simple answer to the argument . . . is that such procedures do not involve the termination of a potential human life." *Maier v. Roe*, 432 U.S. at 480. The class of women seeking abortion is not "similarly situated" with the class of persons seeking other medical treatment. That the standard for determining eligibility for publicly funded abortions in the Connecticut abortion funding restriction case upheld in *Maier* may have been less restrictive than the standard in this case does not alter the reality that abortion "involves the termination of a potential human life." *Id.*

ii) Abortion Is Unique as a Medical Procedure Since It Is Morally Repugnant to Large Numbers of Taxpayers.

Most medical procedures involve morally neutral acts. There are exceptions, abortion being one. A high percent-

age of American taxpayers find abortion morally repugnant.

iii) Abortion Is Unique as a Medical Procedure Because of Its Profound Demographic and Fiscal Import.

There are both demographic and fiscal reasons to encourage childbirth and discourage abortion, matters of profound potential national import. Clearly, Congress and the States can distinguish between medical procedures on such grounds.

iv) Abortion Is Unusual as a Medical Procedure Since, in Additional to Medical Reasons, There Are Also Non-Medical Reasons for an Abortion.

As this Court pointed out in *Roe v. Wade*, 410 U.S. at 153, in addition to medical reasons, there are non-medical reasons which a woman may consider in reaching an abortion decision. This Court cited, *inter alia*, the following: "distressful life and future," "distress, for all concerned, associated with the unwanted child," "the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it," "the additional difficulties and continuing stigma of unwed motherhood." The mere existence of these other non-medical reasons increases significantly the potential for abuse within a program which funds abortion under a relaxed standard.

One does not seek an appendectomy, kidney dialysis treatment, or open heart surgery when such procedures are not medically indicated. But abortions are most often sought for reasons which do not relate to health. There are medical and non-medical reasons for the use of drugs, and both the federal government and the State of Illinois

have responded to the potential drug abuse created by this circumstance with controlled substance acts. To the extent the State can protect itself from abuse and fraud (see *Shapiro v. Thompson*, 394 U.S. at 637) with a controlled use of drugs act, it can protect its interests with a more restrictive abortion funding policy. Indeed, this Court has recognized the potential for abuse in this context, as well as the State's authority to take measures to prevent such abuse, writing that "it is not unreasonable for the state to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes." *Maier v. Roe*, 432 U.S. at 480.

3. The Constitutional Significance of These Reasonable Bases for the Legislative Classification Involved in the Abortion Funding Restrictions.

As Mr. Justice Cardozo stated, the "wisdom or unwisdom . . . in the scheme of benefits set forth . . . is not for [this Court] to say. The answer to such inquiries must come from Congress, not the Courts. [This Court's] concern . . . is with power, not wisdom." *Helvering v. Davis*, 301 U.S. 619, 640 (1937). The district court ignored this principle of this Court's jurisprudence, assuming unto itself the power to determine the relative import of competing state interests. Such "substantive due process", or here, "substantive equal protection," has been rejected by this Court. See Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905). It should not now be revived.

However, if this Court should deem it appropriate to review the "wisdom, providence, and harmony" of the legislation now before it (but compare *Dandridge v. Williams*, 397 U.S. at 484, and *Williamson v. Lee Optical Co.*, 348 U.S. at 488), then it should consider the legislative facts discussed in this Brief at 70-83.

D. Strict Judicial Scrutiny Does Not Apply To The Hyde Amendment Or P.A. 80-1091.

Neither the Hyde Amendment nor P.A. 80-1091 warrant invocation of strict judicial scrutiny because neither law involves discrimination against a suspect class, or state action which impinges upon or penalizes the exercise of a fundamental right.

1. Neither the Hyde Amendment Nor P.A. 80-1091 Discriminate Against a Suspect Class.

The case before this Court does not involve discrimination against a suspect class: "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases." *Maier v. Roe*, 432 U.S. at 470-471. Nor is a suspect class created merely because a physician may deem an abortion "necessary." This Court has never held that the asserted needs of welfare recipients generate a suspect class where none had previously existed. Even statutory classifications in governmental social and economic programs which deny "the most basic economic needs" to a particular class have not been subject to strict judicial scrutiny on that account. *Dandridge v. Williams*, 397 U.S. at 485. Welfare benefits are not a fundamental right, and neither the state nor federal government is under any sort of obligation to guarantee minimum levels of support. *Maier v. Roe*, 432 U.S. at 469.

2. Neither the Hyde Amendment Nor P.A. 80-1091 Impinge Upon a Fundamental Right.

The abortifacient aspect of the right to primary secured in *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the alloca-

tion of public funds." *Maier v. Roe*, 432 U.S. at 474. The restrictions now before this Court place "no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Id.* at 474. Therefore, neither the Hyde Amendment nor the Illinois law impinge upon the fundamental right recognized in *Roe*.

Any claim that the failure of government to fund any exercise of abortifacient liberty—including an abortion deemed "necessary"—unduly burdens the woman's freedom must rest on a faulty perception of the nature of the right to privacy.

"[T]he right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." 432 U.S. at 473. Here, the "woman's interest" lies in making a decision whether to terminate pregnancy and in preserving her health by the choice of pregnancy termination in preference to other available methods of treatment. There is no legally cognizable distinction between the woman's interest at stake here and the interest considered in *Maier*. Certainly, the woman's health interest is heightened in the present context. But in other circumstances, social, economic, familial or age factors become considerations at least as critical as health may be. *Doe v. Bolton*, 410 U.S. at 192. Yet the government would not be obliged under *Maier* to fund abortions because the woman's economic circumstances are especially unfortunate, or because her family is particularly large, or because pregnancy would attach a special social stigma, or because the woman is particularly young or old. Neither is the government obliged to fund abortion merely because a physician may deem the procedure especially appropriate treatment for a health problem.

Regardless of the nature of the woman's interest at stake, there exists no state action which impinges upon the woman's rights in this context. Any "burden" imposed upon the woman arises out of the refusal of the physician to render a particular treatment he deems necessary because he may not be reimbursed by the woman on account of her indigency. Moreover, a *physician's* belief that abortion is "necessary" cannot logically generate any *state* interference with the right to privacy. The Constitution does not provide the physician with any special claim on the Treasury such that the State must respond to a "medical judgment" by opening the public coffers to him. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with State policy." *Maher v. Roe*, 432 U.S. at 475. It is one thing for the State to proscribe or penalize performance of an abortion a physician deems necessary. It is quite another thing for the State to encourage the physician through allocation of public funds to employ alternative methods of medical care for the woman in order to preserve both its interest in the protection of fetal life and its interest in maternal health.

The continuing validity of this distinction in the present context is reinforced by reference to an analogy drawn by this Court in *Maher*. *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), acknowledged the right of parents "to direct the upbringing and care of children under their control." *Maher v. Roe*, 432 U.S. at 476. In the face of this fundamental interest, "closely analogous" to the right secured in *Roe* (*id.*), state restrictions on the parents' right to have children instructed in a foreign language and to choose a private rather than a public school education could not survive.

But the parents' right to select foreign language instruction or a parochial school education for their children creates no special obligation in the State to subsidize effectuation of such parental decisions when it finances instruction in English or a public school system. Similarly, state support for medical treatment incident to childbirth generates no compelling obligation to finance effectuation of an abortion decision. The judgment of a parochial school teacher or an instructor in foreign languages that it is "educationally" or "religiously necessary" to the best interests of a particular child to subject him to their discipline cannot affect the freedom of the State to disburse its funds in accord with its own interests. Likewise, the judgment of a physician that an abortion was "medically necessary" does not create any new obligation in the State to reimburse him for having performed it.

Because neither the Hyde Amendment nor P.A. 80-1091 represent state action which burdens or impinges on a fundamental right, strict judicial scrutiny may not be invoked on such grounds.

3. Neither the Hyde Amendment Nor P.A. 80-1091 "Penalize" the Exercise of a Fundamental Right.

In *Shapiro v. Thompson*, 394 U.S. 618 (1968), and in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), this Court held that States may not establish residency requirements for government benefits when this would "penalize" the right to interstate travel for poor persons.

Any claim that strict scrutiny is the appropriate standard for judicial review in this case because the Hyde Amendment and the Illinois statute constitute a "penalty" on the exercise of a fundamental right must be rejected here on the same grounds this claim was rejected in *Maher*:

Appellees' reliance on the penalty analysis of *Shapiro* and *Maricopa County* is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right. Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers.

Maher v. Roe, 432 U.S. at 474-475 n.8.

Nor did *Maricopa County* or *Shapiro* hold that States would penalize the right to travel interstate by refusing to pay bus fares of indigent travelers told that it is "medically necessary" for them to relocate in another State with a different climate. The mere private judgment of an individual physician that a certain course of conduct is in the interest of health—whether to travel or to procure abortion—cannot transform a state social and economic program into what amounts to a criminal law.

Neither the Congress nor the Illinois legislature deny "general welfare benefits" to women who have obtained

tended to encourage women to seek solutions other than abortion to certain problems presented by pregnancy, as was the Connecticut statute at issue in *Maher*. But mere failure to subsidize an abortion, including a so-called medically indicated abortion, does not evidence any intent to punish the woman for having chosen to abort. Otherwise, any state refusal to fund an exercise of a fundamental right must be deemed to constitute a "penalty."

Moreover, in *Shapiro* and *Maricopa County* this Court found that the *only* actual goal of the durational residency requirements was to discourage interstate travel. Discouragement of the fundamental right to interstate travel is not a permissible state purpose, and if the law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States v. Jackson*, 390 U.S. 570, 581 (1968), quoted with approval in *Shapiro v. Thompson*, 394 U.S. 618, 631 (1968). But the laws now before this Court have positive purposes other than to "chill" the exercise of a decision whether or not to abort. The state's interest in potential human life and in childbirth, in respecting the moral values of citizens, in demography and in fiscal soundness, all provide "permissible state purposes" for refusal to fund abortion, as this Court has acknowledged.

Finally, in *Maricopa County* this Court suggested that the durational residency requirement there at issue was "cruel" because the indigents were not provided with the "means to obtain alternative treatment" (*Memorial Hospital v. Maricopa County*, 415 U.S. at 260-261), an observation stressed by the district court. *Zbaraz v. Quern*, 469 F.Supp. at 1220-1221. But, in the present context, both

federal and state medicaid plans fund alternative forms of treatment for the indigent pregnant woman.

Neither the Hyde Amendment nor the Illinois abortion funding restriction burden the right to abort or involve a suspect class. They do not penalize the right of the woman to decide whether or not to terminate pregnancy. Therefore, they are not subject to strict judicial scrutiny, and they must be upheld because they rationally relate to valid state interests.

VI.

THERE ARE ADDITIONAL FACTORS WHICH THIS COURT SHOULD CONSIDER IF, CONTRARY TO ITS JURISPRUDENCE, IT SHOULD UNDERTAKE TO PASS JUDGMENT ON THE WISDOM OF THE CONGRESSIONAL AND STATE ORDER OF PRIORITIES AMONG THE VARIOUS COMPETING STATE INTERESTS INVOLVED IN THE ABORTION DECISION:

A. The Existence of Alternative Medical Treatment Which Is Funded Under Federal and State Medicaid Programs Eliminates Any Significant Health Hazard to Indigent Pregnant Women Seeking Abortion

The district court found that the

“effect of the new criteria . . . will be to increase substantially material morbidity and mortality among indigent pregnant women.”

Zbaraz v. Quern, 469 F.Supp. at 1220.

The court then found that the states' interest in the fetus becomes “illegitimate” if state refusal to fund may result in increased maternal morbidity. *Id.*

But if the basis for the district court's decision were sound, then the Connecticut statute at issue in *Maher* could

not have been upheld. This Court has held that abortion, at least in the first trimester, is “safer” than childbirth. *Roe v. Wade*, 410 U.S. at 163. Failure to fund such abortions, whether or not they are conceived to be “elective”, would then result in greater maternal morbidity. To permit states to refuse to fund *any* abortions would therefore be unconstitutional under the district court's theory.

Plaintiffs' affiant indicates that instances exist in which the only effective medical treatment will necessarily result in the death of the fetus. Depp Affidavit I, para. 8 (A. 31). Ectopic pregnancy is such an instance. Depp II, para. 5 (A. 104). In such cases, the federal and state medicaid programs will provide funds for the treatment provided.

Beyond these cases, the most that can be said “is that a particular patient, evaluated on an individual basis, has a certain health profile which creates a higher than normal risk of adverse consequences to her health if her pregnancy is carried to term.” Depp II, para. 11 (A. 106). The question is how to cope with that risk. One alternative, of course, is to abort. But the medical literature and the affidavit of plaintiffs' witness on which the lower court's finding was based all support the conclusion that alternative methods of treatment are available to meet the health needs of pregnant women, and that the basis for an asserted “medical need” for an abortion in such cases depends upon the assumption that women who desire abortions will not cooperate with the alternative treatment and that, as a result of their anticipated noncooperation, their health might be damaged.

Indeed, plaintiffs apparently agree with the Affidavit of Dr. Williams where he states that there are methods of treatment other than abortion for a woman with a health

difficulty in pregnancy are available in every case (A. 98, 99), asserting in opposition to Dr. Williams only that abortion is "preferred" (A. 108).

In order to comprehend the nature of the logical error upon which the district court based its finding, it is desirable to consider from the standpoint of medical literature several of the conditions for which the plaintiffs' affiants would certify an abortion as "medically necessary": sickle cell anemia (A. 36); hypertension (A. 32, A. 33, A. 104, A. 110); pre-eclampsia (A. 32, A. 105); varicose veins (A. 37); diabetes (A. 32); psychosis (A. 116).

In a study of 14 pregnancies in 13 patients with homozygous hemoglobin S disease (sickle cell anemia), the Chicago Lying-in Hospital showed that, with proper treatment, no maternal deaths occurred in pregnant women with sickle cell anemia who carried their pregnancies to term.¹⁸ Thirty-six consecutive pregnant patients with sickle cell anemia, treated by prophylactic partial exchange transfusion, also went to term with no maternal mortality.¹⁹ There is no support in the medical literature for abortion as a means of treating sickle cell anemia. The district court found that women who go into sickle cell crisis during pregnancy have a 25% mortality rate. *Zbaraz v. Quern*, 469 F.Supp. at 1220. But this is true if and *only* if the woman does not receive treatment for her malady—a fact not considered by the district court. Both state and federal medicaid plans provide for such treatment.

Several medical articles indicate that hypertension in a pregnant patient is treatable without significant increase

¹⁸ Fiakpui and Moran, *Pregnancy in the Sickle Hemoglobino-pathies*, 11 JOURNAL OF REPRODUCTIVE MEDICINE 28 (1973).

¹⁹ Morrison and Wiser, *The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated with Sickle Cell Hemoglob-inopathies*, 48 OBSTETRICS AND GYNECOLOGY 516 (1976).

in risk to the woman who carries her pregnancy to term. Hypertension can be controlled in many instances by a change of lifestyle from that which the patient with hypertension follows to a sedentary one.²⁰ Control of the pregnant woman's diet is effective in many patients.²¹ Certain drugs are effective in the treatment of hypertension such as thiazides, methyldopa (Aldomet) or Hydralazine (Apre-soline). Medical literature does not support abortion as a means of treating a pregnant patient for hypertension.

Treatment for mild pre-eclampsia is bedrest in the patient's home with frequent visits to the treating physician.²² Hospitalization may be indicated if improvement does not follow immediately.²³ At least four medical studies indicate that, with proper treatment, all pre-clampsia patients may bring their pregnancies to term and the maternal mortality rate should be zero.²⁴ Thus, abortion as a means of treatment for toxemia is not supported by the medical literature.

At least six effective medical treatments are available for patients with varicose veins.²⁵ Even for the pregnant patient varicose veins are not considered a serious compli-

²⁰ D. Ian, PRACTICAL OBSTETRICAL PROBLEMS (1st ed. 1979); Gant, *et al.*, *Clinical Management of Pregnancy-Induced Hyperten-sion*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 397 (1978).

²¹ L. Townsend, HIGH BLOOD PRESSURE AND PREGNANCY (1st ed. 1959).

²² THE MERCK MANUAL 953 (13th ed. R. Berkow 1977).

²³ *Id.*

²⁴ Gant, *et al.*, *supra* at n. 3; Zuspan, *Problems Encountered in the Treatment of Pregnancy Induced Hypertension*, 131 AM. J. OBSTET. GYNECOL. 591 (1978); Freund, *et al.*, *Hemodynamic and Metabolic Studies of a Case of Toxemia of Pregnancy*, 127 AM. J. OBSTET. GYNECOL. 206 (1977); Pritchard and Pritchard, *Stan-dardized Treatment of 154 Consecutive Cases of Eclampsia*, 123 AM. J. OBSTET. GYNECOL. 543 (1975).

²⁵ Tunick, *An Internist Looks at Varicose Veins*, 11 CONTEM-PORARY SURGERY 112 (1977).

cation.²⁶ The medical literature indicates that varicose veins are not an indication for abortion.²⁷

The literature indicates that in the past ten years "Important advances have been made in caring for the pregnant woman with diabetes mellitus . . . (and) [m]aternal mortality has been all but eliminated and maternal morbidity has been reduced significantly."²⁸ The literature indicates that physicians treating women with diabetes can bring their patients to term by keeping the disease itself under control. Proper attention to insulin, diet, physical activity, and stress are effective means of controlling diabetes.²⁹ Class A diabetes (the least serious form of the disease) can usually be managed by diet alone.³⁰ Medical literature does not support abortion as a treatment for the pregnant diabetic.

Abortion has no place in the treatment of the mentally ill or, for that matter, in the prevention of mental illness.³¹ Psychiatric indications for abortion such as threats of suicide, are not supported by the medical literature which indicates, to the contrary, that pregnancy may act as a preventative against suicide.^{32, 33} "Certain basic operational

²⁶ Cranley, *Managing Varicose Veins in Pregnancy*, 7 CONTEMPORARY OB/GYN 143 (1976).

²⁷ *Ibid.*

²⁸ Gabbe, *New Ideas on Managing the Pregnant Diabetic Patient*, 13 CONTEMPORARY OB/GYN 109 (1979).

²⁹ *Ibid.*

³⁰ *Id.* at 110.

³¹ PSYCHOLOGICAL ASPECTS OF ABORTION (ed. Mall & Watts, University Pub. 1979); Sim, *Abortion and the Psychiatrist*, 2 BRIT. MED. J. 145-148 (1963).

³² *Ibid.*

³³ Barno, *Criminal Abortion Deaths, Illegitimate Pregnancy Deaths, and Suicides in Pregnancy*, 98 AM. J. OBSTET. GYNECOL. 356 (1967).

concepts proved to be wrong, such as the notion that impending psychoses or serious threats of psychotic decompensation and serious risks of suicide were indications for abortion."³⁴ The Court should note that post-abortion psychoses can and do occur.³⁵

In view of the weight of the available medical literature, the most that can be said regarding plaintiffs' affiants' statements that abortion is "medically indicated" because of one of the above mentioned diseases, is that plaintiffs' affiants would *prefer* to abort the patient or that the patient would *prefer* abortion rather than bringing the child to term.

Further, plaintiffs' affiants' claims, accepted by the district court, that morbidity and mortality will be increased is not borne out statistically. Intervening defendants submitted to the district court the Department of Health, Education, and Welfare, Center for Disease Control, 28 *Morbidity and Mortality Weekly Reports* 4 (Feb. 2, 1979), in which was reported the results of a study by the Department on the impact of the Hyde Amendment on abortion-related medical complications (A. 138). This study indicated that there was no increase in morbidity and mortality as a result of the restriction of federal funding of abortion (A. 141). The affidavits of the plaintiffs only serve to emphasize the necessity of legislative controls on reimbursement to physicians for abortions, if state and federal government desire to protect their legitimate interests at stake in abortion.

³⁴ Babikian, *Abortion*, in Vol. 2, A COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1496-1500 (4th ed. 1978).

³⁵ Ekblad, *Induced Abortion on Psychiatric Grounds*, 99 ACTA PSYCHIAT. NEURAL. SCAND. 1 (1955).

Any increased morbidity or mortality which could arise would likely result from *physician* failure to employ alternative methods of care, or *patient* failure to follow proscribed alternative forms of care. Neither the Hyde Amendment nor P.A. 80-1091 are responsible for such conduct on the part of the patient or the physician. The district court thus erred in holding these state and federal funding restrictions cause increased maternal morbidity or mortality. No such increase has been detected and even if it exists, it would be the result of *private* not state action.

B. The Standard of "Medical Necessity" or "Medically Indicated" Urged by Plaintiffs Is Loose, Inaccurate and Misleading, Is Subject to Misunderstanding and Abuse within the Abortional Context, and Effectively Places Important State Interests in the Hands of a Physician Class Whose Interests and Loyalties Conflict with Those of the State

From a practical standpoint, a looser standard for reimbursement for abortion performance, such as "medical necessity" or "medically indicated", would result in public funding of elective abortion.

In *McRae v. Califano*, a case seeking the invalidation of the Hyde Amendment, one of the abortion-performing plaintiffs, Dr. Jane Hodgson, in response to a question concerning the percentage of abortions she would certify as "medically necessary," testified:

In my medical judgment every pregnancy that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted. [sic]

In good faith, I would recommend on a medical basis, you understand, that, and it would be 100%. . . . I think they are all medically necessary. . . . Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary be-

cause I am considering the woman's physical, mental, emotional and social and welfare and family and environment and all that. . . . I am concerned with the quality of life not physical existence. . . .

Transcript, August 3, 1977, at 99-101, *McRae v. Califano*, No. 76-C-1804 (E.D.N.Y. filed Oct. 1, 1976).

Dr. Zbaraz, an abortion-performing physician testified in the case now before this Court that:

A. If I understand the question, how many abortions would I have been able to do in 1977 on medically indigent to be reimbursed by medicaid, whose life was not severely threatened but I felt that the abortions were still medically indicated?

Mr. Bennett: Yes, or medically necessary.

A. The great majority.

Zbaraz Deposition at 32.

A recent book by the former Medical Director of the National Abortion Rights Action League, Dr. Bernard Nathanson, describes in some detail how, prior to the legalization of abortion, he and other physicians who advocated abortion deliberately employed "mental health" indications to circumvent the law by obtaining an abortion for virtually any woman who desired one. B. NATHANSON, *ABORTING AMERICA* 39-42, 47 (1979).

Since the *Maher* and *Beal* decisions, there is concrete evidence that physicians, who sincerely believe that abortions should be available to all poor women desiring them, have not hesitated to employ similar "stretching" tactics to secure abortion funding. Maryland statistics provide one indication of the way in which claims of "health needs" may be used to stretch the law. In fiscal year 1972, when abortion was illegal in Maryland except for reasons of maternal health, 9,050 abortions were reported as having been performed for health reasons. Preventative Medicine Division for the State of Maryland, *Induced Abortion Surveillance Report of the Department of Health and Mental Hygiene* (1972). After legalization, by calendar year 1976, the last year in which the state reported the

reasons given for abortions performed, 19,332 elective abortions were reported—but only 1,159 were reported as done for health reasons. *Induced Abortion Surveillance Report of the Department of Health and Mental Hygiene, for the State of Maryland, Preventive Medicine Administration, (Calendar Year 1976)*. During fiscal year 1976, when Medicaid funding was available for all abortions requested by Medicaid-eligible women, 4,327 elective abortions were certified for reimbursement, while only 454 were certified for health reasons. Deposition of John J. Kent, Jr., Asst. Sec. for Medical Care, Dept of Health and Mental Hygiene for the State of Maryland, Jan. 9, 1978, p. 48, in *Kindley v. Lee*, Equity No. 24,688 (Circuit Ct. for Anne Arundel County). In fiscal year 1979, after Maryland limited reimbursement to those abortions performed for health reasons, 5,564 were certified for reimbursement as necessary for health reasons. *Quarterly Report of Abortion Services Funded Through Maryland Medical Assistance Programs for Fiscal Year 1979*. Whether an abortion is considered to be required for “health reasons” frequently depends less on the actual health conditions of the woman than on the desire of the physician to be reimbursed by the government.

Nor are these isolated instances. Planned Parenthood, a major abortion provider, commenting on the Court decisions in *Beal*, *Maher*, and *Poelker*, wrote:

Another unresolved issue is how the states and the federal government will define “medical necessity.” The Court’s own definition in *Doe v. Bolton*—which it quoted in the Medicaid decisions—is that “whether an abortion is ‘necessary’ is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.” This definition would appear to encompass all the factors currently involved in the decision making in regard to abortions.

Planned Parenthood Washington Memo. SUPREME COURT TO INDIGENT WOMEN: LET THEM EAT CAKE 2 (June 19, 1978).

When the Hyde Amendment was under debate in Congress, the Senate offered language that would have paid for abortions when “medically necessary.” Abortion advocate Senator Packwood explained:

When the issue first arose this year, I took the strong position that the Federal Government should provide funds for all medicaid abortions. When the Senate voted in disagreement with this position, I reluctantly supported the compromise which provides Federal funding only for those abortions deemed medically necessary. Since the Supreme Court defined medically necessary abortions very broadly in 1973, this language did not violate my beliefs on this issue too severely.

123 CONG. REC. S18589 (daily ed. Nov. 3, 1977).

When the “medically necessary” language came up for a vote in the House, Representative Daniel Flood, who chaired the House side of the Conference Committee, said:

Experts agree that to permit payments for abortions “where medically necessary”—that phrase is as proposed by the Senate—would open the door to abortions for all sorts of reasons, especially those related to mental health. The Senate amendment would put in language that would in effect permit payment for abortions as a method of family planning or for emotional or social convenience, which is just what the House of Representatives and the American people want to stop.

123 CONG. REC. H10129-30 (daily ed. Sept. 27, 1977).

Conference Committee member Representative Silvio Conte elaborated:

An abortion could be performed as a matter of convenience as long as a doctor authorized it as a medical necessity. Physicians have already indicated that their

interpretation of "medically necessary" means "an abortion that was requested by a woman." . . . Indications are that if this "medical necessity" loophole is allowed to stand, elective abortions will be performed under the guise of mental health. For example, when California liberalized its abortion law in 1968, 92 percent of the abortions done in the first year were for mental health reasons. In short, adopting this language would mean abortion upon demand.

The Senate exemptions are so numerous and broad as to leave the Government with the obligation to pay for virtually all abortions. When the Senate passed the language on June 29, 1977, Dr. Louis Hellman of the Population Reference Bureau estimated in the *Washington Post* that under the Senate language, 90 percent of those abortions now performed would still remain federally financed. In contrast, under the language supported by the House conferees, Dr. Hellman estimated that "only a few thousand—possibly 1,600 a year" would be financed by the Federal Government.

123 CONG. REC. H10130 (daily ed. Sept. 27, 1977).³⁶

Defeating the "medically necessary" language, the House expressed concurrence with this interpretation, and of course the Congress eventually arrived at a compromise

³⁶ The *Washington Post* article referred to is: Rich, *Senate Measure Found to Permit Most Abortions*, *Wash. Post*, July 8, 1977, at 1. It read, in pertinent part:

A leading population expert, Louis Hellman of the respected Population Reference Bureau, estimated yesterday that, under a Senate-passed restriction on federal financing of abortions, 90 per cent of those now performed could still be done.

That is because of a number of exceptions written into the Senate legislation, and especially a very broad exception permitting any abortion "medically necessary," Hellman told a reporter. . . . (In California, officials said in a phone interview, physicians list 90 per cent of Medicaid abortions as "therapeutic.")

Hyde Amendment excluding the term "medically necessary."

Illinois criminal law now provides that no "abortion shall be performed except by a physician after he determines that, in his best clinical judgment, the abortion is necessary."³⁷ Upheld against motion for preliminary injunction, *Charles v. Carey*, No. 79 C 4541 (N.D. Ill. filed Nov. 16, 1979), *slip op.* at 14, *injunction pending appeal denied*, *Charles v. Carey*, No. 79-2399 (7th Cir. December 3, 1979). This provision is identical to one upheld by the Court in *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973). Implicit in *Beal* and *Maher* is the proposition that there exists a class of abortions which a State may not constitutionally prohibit, but for which it has no constitutional or statutory obligation to fund. If a State could not legally restrict its abortion funding to grounds narrower than those listed in the *Bolton* construction of "clinical[ly] . . . necessary" ("medical judgment . . . exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"), this class would be nonexistent, and the *Maher* decision would be meaningless. It follows, therefore, that if *Maher* is not to be effectively abrogated, the state's legitimate interest in fetal life must be held to justify the State's drawing a line which is narrower than all that might be encompassed by an inclusion of all abortions for which a "health" need is asserted.

³⁷ Amendment to the "Illinois Abortion Law of 1975," ILL. REV. STAT. ch. 38 §81-23 (1979):

Sec. 3.1(A). Medical Judgment. No abortion shall be performed except by a physician after he determines that, in his best clinical judgment, the abortion is necessary. Any person who intentionally or knowingly performs an abortion contrary to the requirements of this paragraph (A) commits a Class 2 felony.

Although the district court which passed on the constitutional issue declared itself "encouraged by affidavits submitted by respected members of the medical profession that suggest that the percentage of abortions any physician would deem 'medically necessary' may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion (*Zbaraz v. Quern*, 469 F.Supp. at 1221), it is noteworthy that Dr. Depp's affidavit also indicates that the percentage may be as high as 50% (A. 107). Furthermore, Dr. Depp concedes, "Some doctors, of course, have higher thresholds of intervention and some have lower ones. . . ." (A. 107). Dr. Hodgson, for one, has a very low threshold indeed.

The problem is not so much a matter of physician fraud, or even of bad faith. Rather, it is that, given the inherent flexibility of "health" as a standard, and the widely divergent views on what it may mean, highly motivated physicians, guided by what they may regard as the most humanitarian of considerations, may be disposed to interpret any health-related standard as broadly as possible. Unlike other medical procedures, abortion is the subject of immense national controversy. Passions are high; commitments run deep. In such circumstances, it is not unreasonable for a State to conclude that some, if not all, abortion performing physicians are likely to be very strong partisans of funding the abortions of indigent women, and thus likely to construe any funding guideline in such a way as to undercut the State's strong interest in fetal life to the maximum extent possible.

Were other important state interests not necessarily abrogated or ignored upon the performance of an abortion, perhaps it would not be unreasonable for the Congress and the State of Illinois General Assembly to defer simply to the physician's judgment and discretion. But the physician is the agent of the woman, not of the State, and can hardly be

expected to act on behalf of the state's interests, particularly when it is his economic interest to perform the abortion.

C. The Existence of Competing and Conflicting State Interests, Coupled With the Real Danger of Abuse, Justify a Standard More Demanding Than Medical Necessity for the Payment of Public Funds for Abortion

Several legitimate interests of state, some competing, are involved in the abortion decision. By selecting the standards for abortion reimbursement in the Hyde Amendment and P.A. 80-1091, the federal government and the State of Illinois³⁸ have attempted to maximize to the extent possible all of their interests at stake in abortion: the State's interest in the fetus is maximized by the more exacting standards in the Hyde Amendment and P.A. 80-1091; the State's interest in the health of its citizens is not significantly harmed by these standards since the alternative forms of treatment are made available; fiscal and demographic interests are furthered.

³⁸ The following 38 states have, by legislative enactment or administrative order provided for abortion funding in accordance with, or on more restrictive terms than, the Hyde Amendment: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

The following three states by legislative enactment or administrative order are providing abortion funding similar to that available under the Hyde Amendment with additional provisions applicable to congenital defects: California, Iowa, Maryland.

This information was gathered via personal phone calls to state welfare offices and other public service organizations.

VII.

THE ILLINOIS FUNDING LIMITATION IS CONSISTENT WITH FEDERAL STATUTORY LAW

Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low income persons. . . . The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures.

42 C.F.R. §430.0 (1978).

To resolve whether Illinois' refusal to fund abortions not necessary to save maternal life is consistent with Title XIX of the Social Security Act, this Court must resolve three issues: 1) what standard the Title establishes for state inclusion or exclusion of specific services; 2) what relevant factors or interests a State may validly take into account in applying that standard; 3) whether, in this instance, Illinois applied those interests in a manner which met or violated that standard.

A. The Standard for Determining the Validity of Service Limitations Is Whether They Are Reasonable and Consistent With the Objectives of the Title

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975).

A state plan for medical assistance must . . . include reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title].

42 U.S.C. §1396a(a)(17) (1976).

In *Beal v. Doe*, 432 U.S. 438, 444 (1977), this Court held, "This language confers broad discretion on the states to

adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives of the Act.'"

42 U.S.C. §1396a(a)(13)(B) (1976) establishes the categories of care and services to be provided by the state plan through an incorporating reference to 42 U.S.C. §1396d(a) (1976) (emphasis added):

(a) The term "medical assistance" means payment of *part* or all of the cost of the following care and services . . . for individuals . . . whose income and resources are insufficient to meet all of such cost—

- (1) inpatient hospital services . . . ;
- (2) outpatient hospital services;
- (3) other laboratory and x-ray services;
- (4) (A) skilled nursing facility services . . .
(B) . . . early and periodic screening and diagnosis . . . ; and
(C) family planning services . . . ;
- (5) physicians' services . . .

As this Court held, "[N]othing in the statute suggests that participating states are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal v. Doe*, 432 U.S. 438, 444 (1977).

The Health, Education, and Welfare (HEW) regulation implementing §1396(a)(13)(B) (1976) is 42 C.F.R. §440.230 [43 Fed. Reg. 57253 (Dec. 7, 1978)]:

- (a) The [state] plan must specify the amount and duration of each service that it provides.
- (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
- (c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a

required service under §440.210 and §440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.³⁹

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

With regard to 42 C.F.R. §440.230 (c)(i):

First, the regulation precludes denial or reduction in the scope of a service only when the limitation is made "arbitrarily." If the limitation is made on the basis of legitimate state interests, it is not prohibited.

Second, the constraint on state limitation of the scope of a service applies only to distinctions made "solely because of the diagnosis, type of illness, or condition." 42 C.F.R. §440.130(a) (1978) defines "diagnostic services" as "medical procedures . . . to identify the existence, nature, or extent of illness, injury, or other health deviation. . . ." A "diagnosis," therefore, identifies the health problem. It does *not* define the manner of treatment. If there are alternative treatment methods available for the same health problem, nothing in this regulation precludes a State from choosing to fund one alternative treatment method but not another when it makes this choice on the basis of a rational application of legitimate state interests.

With regard to 42 C.F.R. §440.230(c)(2):

First, by explicitly recognizing the right of States to limit a service on the basis of criteria relating to "medical necessity," the regulation authorizes the State to make judgments based on the degree of medical necessity for any

³⁹ §440.210 refers to the categories established in 42 U.S.C. §1396a(a)(13)(B) and §1396d(a). §440.20 refers to the slightly different categories of services which 42 U.S.C. §1396(a)(13)(c) establishes for the "medically needy."

given procedure. The State is not constrained to act as a blind cashier for physicians empowered to exercise unqualified discretion to determine for what service they will be paid. Rather, the State may make its own independent analysis and embody its conclusions in its state plan.

Second, in establishing that the State "may place appropriate limits on a service," the regulation says that these may be based on criteria "such . . . as" medical necessity and utilization control procedures, without excluding other criteria of which these are only examples. As the federal district court of Utah noted in upholding an abortion limitation similar to that of Illinois, "[T]he regulating provision indicates that the 'medical necessity' criterion is merely illustrative of the types of criteria that may be employed to limit services, and nothing in the provision suggests a more restrictive criterion is prohibited." *D—R— v. Mitchell*, 456 F.Supp. 609, 625 (D. Utah 1978).

The opinion of the Circuit Court below devotes a scant two paragraphs to analysis of whether the Illinois limitation is in accord with the Medicaid Act. *Zbaraz v. Quern*, 596 F.2d 196, 198-99 (7th Cir. 1979). These paragraphs explicitly incorporate the reasoning of the First Circuit in *Preterm v. Dukakis*, 591 F.2d 121 (1st Cir. 1979).⁴⁰ The *Pre-*

⁴⁰ The Circuit Court below did diverge from the *Preterm* court in one conclusion. It said that Title XIX's "objectives include furnishing medical assistance 'to meet the costs of necessary medical services.' 42 U.S.C. §1396." *Zbaraz*, 596 F.2d at 198. But in rejecting Plaintiffs' claims that the Title requires States to provide all "medically necessary" services (a conclusion with which the *Zbaraz* court concurred), the First Circuit pointed out that these words, drawn from the Preamble, deal with eligibility for, rather than the extent of, benefits: determining *who* should receive assistance rather than *what* they should receive. "This section merely specifies for whose benefit federal funds are to be appropriated—those 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' . . . See also 42 U.S.C. §1396a(a)(10) (footnote continued)

term reasoning is in accord with the above analysis as it relates to the statutory provisions. However, the *Preterm* court went on to consider an *uncorrected* version of HEW implementing regulation 42 C.F.R. §440.230. As part of a general recodification of federal regulations "in clearer, simpler language," HEW issued a revised regulation, 43 Fed. Reg. 45176, 45228 (September 29, 1978) in the form relied by the First Circuit Court. *Preterm v. Dukakis*, 591 F.2d 121, 126 (1st Cir. 1979). Subsequently, HEW issued a "correction" reinserting the words "arbitrarily" in §440.230(c)(1), and "such criteria as" in §440.230(c)(2), 43 Fed. Reg. 57253 (Dec. 7, 1978), resulting in the version of the regulation printed in this Brief. In doing so HEW noted, "[T]hese omissions have been construed as a policy change restricting a State's authority to decide what medical assistance will be covered under the State Medicaid plan." It said the purpose of reinserting the omitted words was "to avoid further misunderstandings." 43 Fed. Reg. 57253 (Dec. 7, 1978). Interpreting the implementing federal regulations of the Medicaid Title to require the States to fund "medically necessary" abortions is precisely the sort of "misunderstanding" to which the administrators of the Title referred.

(footnote continued)

(C)." 591 F.2d at 194. Accord, *Roe v. Norton*, 522 F.2d 928, 933 (2d Cir. 1975); *Coe v. Hooker*, 406 F.Supp. 1072, 1081 (D.N.H. 1976). Indeed, this interpretation is implicit in *Beal* where this Court emphasized that individual States could, if they chose, include elective abortions in their state Medicaid plans (*Beal*, 432 U.S. at 447). If the Title had specified that its purpose was to pay for "medically necessary services," then those abortions which are "medically unnecessary" (*id.* at n. 11) could not be reimbursable under Title XIX. Compare *ibid* with *Roe v. Norton*, 522 F.2d 928, 939 (2d Cir. 1975) (Muligan, J., dissenting).

B. In Weighing the Standards for What Abortions It Will Fund, A State May Take Into Account Its Interest in Maternal Health, Its Interest in Fetal Life, and Its Fiscal and Demographic Concerns

1. The State Has a Valid Interest in Maternal Health.

In administering a program providing medical assistance, there is no question that one of the state's valid interests is the health of the recipients—in this case, maternal health.

2. The State Has a Valid Interest in Fetal Life.

In *Beal v. Doe*, 432 U.S. 438 (1977), this Court held:

[T]he State has a valid and important interest in encouraging childbirth. We expressly recognized in *Roe* the "important and legitimate interest [of the State] . . . in protecting the potentiality of human life." [410 U.S. at 162.] . . . [I]t is a significant state interest existing throughout the course of the woman's pregnancy. Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth.

Id. at 445-46.

There can be no logical distinction by which it may be held that an interest which a State may properly take into account in setting standards which exclude reimbursement for elective abortions ceases to be a valid interest when the State is judging how to cope with abortions for which some medical reason is asserted. The life of a fetus is just as much at stake when an abortion is performed for health reasons as when it is performed for convenience. If there is a significant state interest in the life of the fetus in one case, it is equally present in the other. If it is an interest

which the State can validly consider in the context of the Medicaid Title in one case, it is an equally valid consideration in the other.

3. The State May Validly Consider Interests Which Are Fiscal or Demographic.

In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court, interpreting the statute regulating Aid to Families With Dependent Children (AFDC), held that the presence of the words "as far as practicable under the conditions in such State" in the first section of 42 U.S.C. §601 (1976), describing the purpose of the Act, meant that Congress, "cognizant of the limitations on State resources," intended to give "each State great latitude in dispensing its available funds." The first section of the Medicaid Act, describing its purpose, uses identical words. 42 U.S.C. §1396 (1976). It follows that in setting standards for the extent of benefits under Medicaid, a State may take into account its valid interest in conserving its limited fiscal resources.

In *Maher v. Roe*, 432 U.S. 464 (1977) this Court held, "[A] State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." *Id.* at 478, n.11. As with the interest of the State in fetal life, there is nothing in the Medicaid Title which would preclude a State from taking this demographic interest into account in setting standards under it.

These interests formed a basis for the Illinois restriction on Medicaid abortion. *See* this Brief at 49-50.

C. Given the Available Evidence Concerning the Relative Impact of Differing Standards on Its Interests in Maternal Health and Fetal Life, Illinois Struck a Reasonable Balance

1. The Availability of Alternative Treatments Alleviates the Need for Abortions for Maternal Health.

Plaintiff's affiant indicates, there are a few instances in which abortions are necessary to prevent maternal death. Depp Affidavit I, para. 8 (A. 31). The Illinois plan would reimburse physicians for abortions performed under such circumstances.

Where some health problem exists during pregnancy, there are alternative methods of treatment available which would be funded under the Illinois plan. *See* this Brief at 70-76.

In view of this, it is entirely reasonable for Illinois to temper its concern over the risks to maternal health from a restriction on the use of tax funds for abortions not necessary to preserve maternal life with the knowledge that alternative forms of treatment exist, and need only the cooperation of the mother to be effective.

2. A Looser Standard Would, In Effect, Result in Funding Elective Abortions.

The distinction between "medically necessary" and "elective" abortion, if it exists at all, is so elusive that the particular state's interests at stake in abortion cannot be adequately protected under a "medical necessity" standard. *See* this Brief at 76-81. For this reason alone, it is reasonable for the State to restrict abortion reimbursement under a more stringent standard.

3. The Illinois Limitation Is Reasonable and Consistent With the Objectives of the Act.

The Illinois legislature was faced with three categories of cases in which abortions might be claimed to be needed for the sake of maternal health.

I. First, there are those abortions necessary to preserve the life of the mother.

II. Second, there are the class of abortions to which plaintiffs overtly make reference: cases in which a variety of pregnancy complications develop and, despite the availability of other means of treatment, the attending physician fears that, because the woman desires an abortion, she will not cooperate with these other means of treatment.

III. Third, there are the class of situations under the *Bolton* definition of "clinical necessity" in which the physician considers that the woman's "emotional well-being" might be impaired by an unwanted child. Dr. Hodgson's understanding of the term "medical necessity" provides the archetype of this class. See this Brief at 76.

In drawing standards for which of these abortions it would fund, Illinois had to weigh its separate, and to some extent conflicting, interests in maternal health and fetal life. Even though there is the danger that abortion-providing physicians may stretch this standard as any other to include as many abortions as possible, Illinois chose to fund abortions in Category I on the basis that, although they are rare, cases do exist in which failure to perform an abortion might genuinely threaten the mother's life. In this category, therefore, despite the risk of abuse, Illinois placed its interest in maternal life and health above its interest in fetal life.

With regard to Category III, Illinois clearly regarded its interest in fetal life as paramount, given the rather attenuated nature of the threat to maternal health.

Category II might be regarded as the gray area. But since these existed no enforceable way to fund Category II abortions without opening the door to a vast number of Category III abortions, and in view of the fact that its interest in maternal health is mitigated by the availability of alternative forms of treatment, Illinois chose to exclude this class from medicaid funding as well.

It was rational to assume that such a funding limitation would in fact advance the state's interest in fetal life and encouraging childbirth: in New Jersey, during the period of time in which a similar limitation was in effect, the number of births to Medicaid-eligible women rose by 30%. *Right to Choose v. Byrne*, 398 A.2d 20 587, 594 (N.J. Super. 1979).

Under Title XIX, the sole question before this Court is whether the Illinois decision is "reasonable" and "consistent with the objectives of the Act." Surely, as the analysis presented here demonstrates, this decision cannot be said to be so irrational as to be "unreasonable."⁴¹

⁴¹ Nor can the Illinois limitation be said to be inconsistent with the Act's objectives. The Preamble to the Medicaid Title, 42 U.S.C. §1396 (1976), states its "purpose" to be "enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance . . . and . . . rehabilitation. . . ." "The word 'practicable' does not necessarily mean 'possible of execution.' An act is practicable if conditions or circumstances permit its performance. It is practicable if under all the circumstances it is feasible, if it can be done lawfully with reasonable convenience." *Wilcox v. Supreme Council of Royal Arcanum*, 123 N.Y.S. 83, 86 (1911). Thus, what services it will provide is up to the State's "reasonable convenience." The word "practical" is a synonym of "practicable" and one of its meanings, given in *Webster's Third New International Dictionary* (Chicago: J.J. Merriam, 1972) is "concerned with voluntary action and ethical decision." In the view of Illinois, conditions and circumstances do not permit the State to fund abortions not necessary to preserve maternal life, partly because among those circumstances are the ethical issues which induce Illinois' voluntary action to avoid funding feticide.

D. The Application Of Standard Extrinsic Canons Of Statutory Construction Reinforces The Validity Of The Illinois Abortion Funding Limitation.

1. Contemporaneous Circumstances Sustain the Validity of the Illinois Limitation.

In *Beal v. Doe*, 432 U.S. 438 (1977) this Court noted that its interpretation was "reinforced by two . . . relevant considerations." One was that "when Congress passed Title XIX in 1965, nontherapeutic abortions were unlawful in most states," and concluded, "In view of the then-prevailing state law, the contention that Congress intended to *require*—rather than permit—participating States to fund nontherapeutic abortions requires far more convincing proof than respondents have offered." *Beal v. Doe*, 432 U.S. 438, 447 (1977).

Indeed, Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage" *United States v. Wise*, 370 U.S. 405, 411 (1962). When Title XIX became law in 1965, 46 of the 50 states, including Illinois, permitted only those abortions necessary to preserve maternal life. George, *Current Abortion Laws: Proposal and Movements for Reform*, 17 WEST. RESERVE L. REV. 371, 375-379 nn. 21-24, 31, 43, 44, 45 (1965). By the same reasoning as that in *Beal*, it is clear that Congress could not have intended, at the time of passage, to force the States to fund abortions beyond the extent that they were necessary to preserve maternal life. Otherwise, one must impute to Congress when it enacted the Medicaid Title an intent to require the several States to fund procedures which violated their own criminal laws.

2. The Administrative Practice of HEW Supports State Power to Limit "Health" Abortion Funding.

The other "reinforcing consideration" cited in *Beal v. Doe*, 432 U.S. 438, 447 (1977), was that HEW, "the agency

charged with the administration of this complicated statute," approved state plans in a manner consistent with "the position that Title XIX allows—but does not mandate—"the abortion funding at stake in *Beal v. Doe*, 432 U.S. at 447. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969). HEW has consistently approved state plans which in substance limit payment for medicaid abortion services to life-threatening situations.⁴²

3. The Interpretive Value of Appropriations Acts Supports the State's Power to Limit "Health" Abortion Funding.

Both of the Circuit Courts of Appeals which have passed on the statutory issue undertook an extensive review of the legislative history of the Hyde Amendments. These reviews convinced them Congress expected that, although the States would have the power to fund abortions beyond the limit of the Hyde Amendment, most States would be induced, by the unavailability of matching Federal money, to refrain from doing so—thus assuming that the States would have the statutory authority to refrain from such funding.

Because they had earlier construed the Medicaid Title to preclude the States from exercising such an option, the Seventh and First Circuits concluded that the Hyde Amendment constituted a "repeal by implication" creating this

⁴² See the approved plans for Kansas, Louisiana, New Mexico, North Carolina and Virginia; Affidavits filed as Exhibits with Brief on Behalf of William A. Lynch, M.D., *et al.*, Amici Curiae in *Preterm v. Dukakis*, No. 78-1324 (1st Cir., Brief filed October 1978), filed as Exhibits attached to the Intervening Defendants-Appellants Brief in the U.S. Court of Appeals, in *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979).

option, though only with regard to funding of abortions not covered by the Hyde Amendment.

A more logical approach would have been to apply the canon of statutory construction which holds that "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight."⁴³ This Court has used subsequent appropriations acts as guides to determine the intent of earlier authorizing legislation.⁴⁴

In addition to the legislative history reviewed by the Circuit Courts, statements made during 1979 by legislators on both sides of the issue and in both House of Congress support a construction of Title XIX which allows the States to limit abortion funding as Illinois has done.

Speaking in favor of abortion funding immediately before a Senate vote in which his position prevailed, Senator Charles Percy said:

If medicaid funding of abortion is approved, . . . it does not even require a State to fund such medical procedures. It simply gives a State the option to receive a partial subsidy of the costs, if it chooses, and only among those States do indigent women then have the choice.

125 CONG. REC. S9,873 (daily ed. July 19, 1979).

Senator Jesse Helms made the same point:

It is important to emphasize that we are determining the extent to which the Federal government will pay for abortions. This language does not, and is not

⁴³ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381, 381 n.8; *FHA v. Darlington, Inc.*, 358 U.S. 84 (1958).

⁴⁴ *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *Isdrandt-sen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937).

intended to restrict the power of the States. The States may still refuse to pay for abortions to the extent they deem appropriate.

125 CONG. REC. S14,496 (daily ed. Oct. 12, 1979).

In the House, Representative Henry Hyde, the sponsor of the Hyde Amendment, was asked whether it was "the intention of the [Hyde Amendment] language to permit States to enact legislation consistent with their own wishes, whether more or less restrictive, to govern the funding of abortions?" To this he replied:

Absolutely. It seems to me that the Federal legislative process ought to control the Federal purse strings, and the State funds ought to be controlled by the State legislatures.

For the courts to say that . . . since in the preamble the words, "medically necessary," are found[,] . . . when abortions were a crime in most of the States of this country at the time that this basic statute was passed, somehow or other that mandates the States to fund abortions, even though we in the Federal government have said we will fund no abortions except to save the life of the mother is ridiculous.

125 CONG. REC. H11,772 (daily ed. Dec. 11, 1979).

This Court has given special consideration to the remarks of the sponsor in construing legislative intent. *Galvan v. Press*, 347 U.S. 522, 526-27 (1954); *United States v. United Mine Workers of America*, 330 U.S. 258, 277 (1947).

It never was the intent of Congress under either the Medicaid Title or the Hyde Amendment to force the States to fund abortions, whether they are deemed "medically necessary or not."⁴⁵ There is not a single shred of evidence

⁴⁵ Representative Donnelly even more forcefully expressed the distortion of congressional intent implicit in court decisions requiring states to fund abortions under the Medicaid Title:

(footnote continued)

in the long legislative histories of the Medicaid Title of the Hyde Amendment which supports the supposition that the Title was intended to include a mandate to the States to fund any abortion. For the Circuit Court to have read such a requirement into the Title, either by way of the Title's implementing federal regulations or by construing

(footnote continued)

... The confusion in the courts is based upon the notion that the medicaid title of the Social Security Act somehow requires the States to fund abortions in the first place and that State refusal to fund abortions is somehow "unreasonable" under the Social Security Act and its regulations.

The fact is that Congress enacted the medicaid title into law in 1965 when practically every State made abortion a crime except to save the mother's life. Therefore, the medicaid title could not have been intended as a mandate to the States to fund "medically necessary" abortions, or any abortions. Any other conclusion would mean that the Congress intended to force the States to violate their own abortion laws, or change them if the States wished to receive Federal funds to enable them to provide care to their impoverished citizens. To impute such an intent to Congress is obviously nonsense. The Social Security Act does not require the States to use their funds for any type of abortion service. Yet, absurdly enough, there are courts in this Nation who are saying that this is in effect what the Congress actually intended when it enacted the medicaid title into law.

I think it is important to make it crystal clear that what we are dealing with now is the extent to which the Federal Government will pay for abortions. We do not intend to restrict the power of the States to refuse to pay for abortions to the extent they deem appropriate, any more than we intend to restrict their power to pay for abortions with their own funds to the extent that they may desire. *The States are absolutely free to fund or refuse to fund abortions as they see fit, as they always have been. Whether the States fund or refuse to fund abortions is not a matter dictated by the Social Security Act or its regulations and, until such time as the Social Security Act is*

(footnote continued)

the Hyde Amendment to represent a minimal standard which States must meet, is an error. Under the Medicaid Title, Illinois is free to fund abortions or to refuse to fund abortions to the extent it deems appropriate.

(footnote continued)

amended by Congress to require the States to fund abortions, the States are not required to do so.

The Congress has debated the extent to which Federal funds should be used for abortions for 4 years now. Many of the courts apparently believe that these heated and protracted debates represent nothing more than arguments on whether the costs of abortion should be borne by the Federal Government or shifted to the States. But anyone who has honestly read the record of these debates would know that we have understood our actions here would have some real effect. They would know that we have not regarded a Government-funded abortion to be in any sense an absolute right this body has ever conferred upon anyone. They would know that this body does not regard and has not regarded abortion to be like any other medical procedure and that we have not regarded it to be a benefit which ought to be financed by the Government except in the most extreme circumstances.

But some courts seem determined to convert our serious deliberations on this matter into a farce—full of sound and fury but signifying nothing—by requiring the States to pay for the very abortions for which we have refused Federal funds. In fact, the Congress has presumed all along that the States have the same authority that we have to decide the extent to which public funds should be used for abortions. This should have been self-evident from the history of our deliberations and of the medicaid title. However, because some courts and perhaps some administrators of the Social Security Act seem to be determined to override our will and the will of the legislatures of the States on this matter, I believe that this fact should now be plainly stated for the record once and for all.

125 Cong. Rec. H9885 (daily ed. Oct. 30, 1979) (emphasis added).

F. Conclusion: The Illinois Funding Restriction Does Not Violate Title XIX Of The Social Security Act.

The Illinois abortion funding restriction is both reasonable and consistent with the objectives of Title XIX. Indeed, Title XIX was never intended by Congress to require the States to fund abortion to an extent greater than Illinois has done. Therefore, the decision of the Circuit Court, mandating that Illinois fund abortions pursuant to Title XIX, whether on its own terms or as altered by the Hyde Amendment, must be reversed.

CONCLUSION

Intervening Defendants-Appellants pray this Court to reverse the decision of the District Court holding the Hyde Amendment and Illinois P.A. 80-1091 unconstitutional, and to reverse the decision of the Circuit Court holding that Title XIX of the Social Security Act requires the States to fund abortion to the extent of the Hyde Amendment or to the extent the physician deems necessary.

Respectfully submitted,

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Nos. 79-4, 79-5, and 79-491

Supreme Court, U. S.

FILED

JAN 24 1980

In the Supreme Court of the United States

K. JR., CLERK

OCTOBER TERM, 1979

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
APPELLANTS

v.

DAVID ZBARAZ, et al.

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS
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UNITED STATES OF AMERICA, APPELLANT

v.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	3
Constitutional and statutory provisions involved	3
Statement	3
Summary of argument	15
Appendix	1a
Argument:	
I. This Court has jurisdiction over the present appeals under 28 U.S.C. 1252, but the district court lacked authority to decide the constitutionality of a federal statute about which there was no case or controversy among the parties..	23
A. The jurisdictional requirements for an appeal under 28 U.S.C. 1252 are satisfied in this case	25
B. The district court's judgment should be vacated to the extent it invalidates the Hyde Amendment, because there is no case or controversy among the parties with respect to the federal statute	26

Argument—Continued	II	Page
C. This Court should review the remainder of the district court's judgment, even though that judgment is appealable under Section 1252 only because the district court mistakenly decided a question as to which there was no case or controversy		29
D. The court lacks jurisdiction, on the present appeals from the district court's April 1979 judgment, to consider aspects of the court of appeals' earlier statutory decision that do not provide alternative grounds on which to support the judgment under review		38
II. The court of appeals correctly decided that states participating in the medicaid program are not required by the medicaid act to fund medically necessary abortions for which federal reimbursement is not available because of the Hyde Amendment		45
III. The challenged Illinois statute and the Hyde Amendment are constitutional because the state legislature and congress had a rational basis for treating abortion differently from other medically necessary procedures		50
A. The constitutional question presented in this case is not affected by the recent change in the Hyde Amendment		50

Argument—Continued	III	Page
B. Legislative distinctions between abortion and other medical procedures should be reviewed under the "rational basis" test		51
C. Legislative decisions to pay for abortions only when the life of the mother would be endangered by carrying the pregnancy to term are rationally related to legitimate government interests		55
Conclusion		64

CITATIONS

Cases:

<i>Bailey v. Patterson</i> , 369 U.S. 31	33
<i>Baird v. King</i> , Civ. No. 79-1132-N (D. Mass. Oct. 11, 1979)	36
<i>Beal v. Doe</i> , 432 U.S. 438	22, 44, 45, 57
<i>Bellotti v. Baird</i> , 428 U.S. 132	23, 63
<i>Belotti v. Baird</i> , No. 78-329 (July 2, 1979)	63
<i>Califano v. McRae</i> , 433 U.S. 916, vacating and remanding, 421 F. Supp. 533....	36
<i>CIO v. McAdory</i> , 325 U.S. 472	29
<i>Colautti v. Franklin</i> , 439 U.S. 379	52
<i>D—R— v. Mitchell</i> , 456 F. Supp. 609, appeal pending, No. 78-1675 (10th Cir.)..	36, 37
<i>Dandridge v. Williams</i> , 397 U.S. 471....	45, 60-61
<i>Doe v. Bolton</i> , 410 U.S. 179	4, 52
<i>Doe v. Busbee</i> , 471 F. Supp. 1326	36
<i>Doe v. Kenley</i> , 584 F.2d 1262	36
<i>Doe v. Mathews</i> , 420 F. Supp. 865	37

IV

Cases—Continued

Page

<i>Doe v. Mathews</i> , 422 F. Supp. 141	37
<i>Doe v. Mundy</i> , 441 F. Supp. 447	37
<i>Doe v. Percy</i> , No. 79-C-367 (W.D. Wisc. Sept. 13, 1979)	36
<i>Farmers & Mechanics National Bank v. Wilkinson</i> , 266 U.S. 503	32
<i>FHA v. The Darlington, Inc.</i> , 352 U.S. 977	17, 27
<i>FHA v. The Darlington, Inc.</i> , 358 U.S. 84	35
<i>Flemming v. Nestor</i> , 363 U.S. 603	27
<i>Fleming v. Rhodes</i> , 331 U.S. 100	26
<i>Fusari v. Steinberg</i> , 419 U.S. 379.....	18, 30, 37, 40
<i>Gonzalez v. Automatic Employees Credit Union</i> , 419 U.S. 90	34
<i>Hodgson v. Board of County Commissioners</i> , No. 79-1665 (8th Cir. Jan. 9, 1980)	36
<i>Kantrowitz v. Weinberger</i> , 388 F. Supp. 1127, aff'd, 530 F. 2d 1034, cert. denied, 429 U.S. 819	62
<i>King v. Smith</i> , 392 U.S. 309	45-46
<i>Legion v. Richardson</i> , 354 F. Supp. 456, aff'd, 414 U.S. 1058	62
<i>Maher v. Roe</i> , 432 U.S. 464	passim
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307	53
<i>McLaughlin v. Florida</i> , 379 U.S. 184	51
<i>McLucas v. DeChamplain</i> , 421 U.S. 21.....	16, 26, 30, 32, 33, 39
<i>Muskrat v. United States</i> , 219 U.S. 346.....	29
<i>Oklahoma v. Harris</i> , Civ. No. 78-0475 (D.D.C. Oct. 31, 1979)	46
<i>Planned Parenthood v. Danforth</i> , 428 U.S. 52	52, 63

V

Cases—Continued

Page

<i>Planned Parenthood Affiliates v. Rhodes</i> , 477 F. Supp. 529	36
<i>Poelker v. Doe</i> , 432 U.S. 519	51, 53, 57
<i>Preterm, Inc. v. Dukakis</i> , 591 F.2d 121, cert. denied, No. 78-1430 (May 14, 1979)	11, 49
<i>Reproductive Health Services v. Freeman</i> , No. 79-1275 (8th Cir. Jan. 9, 1980).....	36, 61
<i>Roe v. Casey</i> , 464 F. Supp. 487	36
<i>Roe v. Wade</i> , 410 U.S. 113	4, 21, 54, 57
<i>San Antonio School District v. Rodriguez</i> , 411 U.S. 1	53
<i>Secretary of the Navy v. Avrech</i> , 418 U.S. 676, rev'g 477 F.2d 1237	33
<i>Shapiro v. Thompson</i> , 394 U.S. 618	51
<i>Smith v. Ginsberg</i> , No. 75-0380 CH (S.D. W. Va. May 9, 1978)	36
<i>TVA v. Hill</i> , 437 U.S. 153	47
<i>United States v. Christian Echoes National Ministry, Inc.</i> , 404 U.S. 561.....	30
<i>United States v. Johnson</i> , 319 U.S. 302.....	29
<i>United States v. Raines</i> , 362 U.S. 17.....	30, 31, 39
<i>Vance v. Bradley</i> , 440 U.S. 93	53
<i>Vargas v. Trainor</i> , 508 F.2d 485, cert. denied, 420 U.S. 1008	46
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483	60
<i>Woe v. Califano</i> , 460 F. Supp. 234 (S.D. Ohio 1978)	36, 57
<i>Women's Health Services, Inc. v. Maher</i> , Civ. No. H-79-405 (D. Conn. Jan. 7, 1980)	36

VI

Constitution and statutes:	Page
United States Constitution:	
Article III	16, 29, 31, 33, 34
Fifth Amendment, Due Process Clause	3
Fourteenth Amendment, Equal Protection Clause	3, 7
Appropriations Act for the Department of Health, Education and Welfare (Hyde Amendment), Pub. L. No. 94-439, Section 209, 90 Stat. 1434	<i>passim</i>
Civil Rights Commission Act of 1978, Pub. L. No. 94-439, Section 209, 90 Stat. 1434	<i>passim</i>
Civil Rights Commission Act of 1978, Pub. L. No. 95-444, Section 3(a), 92 Stat. 1037	58
Department of Defense Appropriations Act, 1979, Pub. L. No. 95-457, Section 863, 92 Stat. 1254	58
Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, Title III, 92 Stat. 1597	58
Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Section 608, 92 Stat. 3601	58
International Development and Food Assistance Act of 1978, Pub. L. No. 95-424, Section 104(a), 92 Stat. 946	58
Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, Section 10, 91 Stat. 1622	58

VII

Constitution and statutes—Continued	Page
Social Security Act, 42 U.S.C. 301 <i>et seq.</i> :	
Title IV, Aid to Families with Dependent Children, 42 U.S.C. 601 <i>et seq.</i>	3
Title XVI, Supplemental Security Income, 42 U.S.C. 1381 <i>et seq.</i>	3, 46
Title XIX, Grants to States for Medical Assistant, 79 Stat. 344, 42 U.S.C. 1396 <i>et seq.</i>	3, 4, 7, 43, 47, 48, 62
42 U.S.C. 1396	44
42 U.S.C. 1396(a) (17) (A)	44
42 U.S.C. 1396(d) (1)-(5)	43
42 U.S.C. 1396a(a) (10) (A)	3
42 U.S.C. 1396a(a) (10) (C)	4
42 U.S.C. 1396a(a) (13) (B)	4, 43
42 U.S.C. 1396a(a) (13) (C)	43
42 U.S.C. 1396a(a) (17) (A)	5
42 U.S.C. 1396b(a) (1)	46
42 U.S.C. 1396d(a)	46
42 U.S.C. 1396d(a) (1)-(5)	4
42 U.S.C. 1396d(a) (17) (B)	62
42 U.S.C. 1396d(b)	47
Pub. L. No. 93-66, Section 212, 87 Stat. 155	46
Pub. L. No. 94-585, Section 2(a), 90 Stat. 2901-2902	46
Pub. L. No. 95-130, 91 Stat. 1153	8
Pub. L. No. 95-165, 91 Stat. 1323	8
Pub. L. No. 95-205, 91 Stat. 1460	7
Pub. L. No. 95-215, Section 7, 91 Stat. 1507	58
Pub. L. No. 95-480, 92 Stat. 1586	8
Pub. L. No. 96-86, 13 Stat. 659, 662	9

VIII

Constitution and statutes—Continued	Page
Pub. L. No. 96-123, 93 Stat. 925, 926	9
28 U.S.C. 1252	<i>passim</i>
28 U.S.C. 1254(1)	42
28 U.S.C. 1254(2)	37, 41
28 U.S.C. 1291	27
28 U.S.C. 2101(c)	42
28 U.S.C. 2103	42
28 U.S.C. (1970 ed.) 2282	33
28 U.S.C. 2403	15
28 U.S.C. 2403(a)	25, 26
Ill. Ann. Stat., ch. 23:	
§§ 5-5, 6-1, 7-1 (Smith-Hurd 1979 Supp.)	6
§§ 6-1 <i>et seq.</i> (Smith-Hurd 1968 and 1979 Supp.)	6
§§ 7-1 <i>et seq.</i> (Smith-Hurd 1968 and 1979 Supp.)	6
Miscellaneous:	
42 C.F.R. 440.230(c)(1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978)	4
122 Cong. Rec. (1976):	
p. 20410	55
p. 27673	55
p. 27675	55
p. 27676	55
p. 27679	55
123 Cong. Rec. S18589 (daily ed. Nov. 3, 1977)	56
123 Cong. Rec. H12489-H12490 (daily ed. Nov. 29, 1977)	56

IX

Miscellaneous—Continued	Page
123 Cong. Rec. (daily ed. Dec. 7, 1977):	
pp. H12769-H12776	8
pp. H12827-H12831	8
pp. S19439-S19446	7
124 Cong. Rec. (daily ed. Sept. 27, 1978):	
p. S16317	56
p. S16318	56
124 Cong. Rec. H12516 (daily ed. Oct. 12, 1978)	56
125 Cong. Rec. (daily ed. Oct. 12, 1979):	
pp. H9075-H9082	9
pp. S14491-S14497	9
125 Cong. Rec. (daily ed. Nov. 16, 1979):	
pp. H10953-H10960	9
pp. S16882-S16885	9
H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. (1979)	56
H.R. Conf. Rep. No. 96-646, 96th Cong., 1st Sess. (1979)	56
H.R. Rep. No. 213, 89th Cong., 1st Sess. (1965)	43, 44, 48
9 <i>Moore's Federal Practice</i> (2d ed. 1975) ..	26, 30
S. Rep. No. 404, 89th Cong., 1st Sess. (1965)	43, 44, 47
R. Stern and E. Gressman, <i>Supreme Court Practice</i> (5th ed. 1978)	26, 30
C. Wright, A. Miller and E. Cooper, <i>Fed- eral Practice and Procedure</i> (1978)	26, 30

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
APPELLANTS

v.

DAVID ZBARAZ, et al.

No. 79-5

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS
DEPARTMENT OF PUBLIC AID, APPELLANT

v.

DAVID ZBARAZ, et al.

No. 79-491

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, et al.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS*

BRIEF FOR THE UNITED STATES

(1)

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-22a) is reported at 469 F. Supp. 1212.¹ The earlier opinions of the district court (J.S. App. 54a-73a, 91a) are not reported. The opinions of the court of appeals (J.S. App. 37a-53a, 74a-90a) are reported at 596 F.2d 196 and 572 F.2d 582.

JURISDICTION

The final judgment of the district court (J.S. App. 23a-36a) was entered on April 30, 1979. Appellants in No. 79-4 filed a notice of appeal on May 2, 1979 (79-4 J.S. App. 9-13). Appellant in No. 79-5 filed a notice of appeal on May 8, 1979 (79-5 J.S. App. A56-A58). The United States filed a notice of appeal on May 25, 1979 (J.S. App. 92a-93a). The jurisdictional statements in Nos. 79-4 and 79-5 were filed on July 2, 1979. On July 18, 1979, Mr. Justice Stevens extended the time for docketing the appeal in No. 79-491 to and including September 22, 1979. The jurisdictional statement in No. 79-491 was filed on September 21, 1979. On November 26, 1979, this Court consolidated the cases and postponed further consideration of the question of jurisdiction until the hearing on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252. Further discussion of the Court's jurisdiction appears at pages 23-44, *infra*.

¹ Unless otherwise indicated, "J.S." and "J.S. App." refer to the jurisdictional statement and accompanying appendix in No. 79-491.

QUESTION PRESENTED

Whether a legislative decision to permit the use of public funds for medically necessary services generally and for abortions necessary to preserve the life of the prospective mother but not for other "medically necessary" abortions violates the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in the appendix to this brief.

STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.*, establishes a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment for needy persons. For a state to qualify for federal assistance under Title XIX, its Medicaid plan must include coverage for the "categorically needy"² for at least

² The "categorically needy" group includes families with dependent children eligible for assistance under the Aid to Families with Dependent Children program (42 U.S.C. 601 *et seq.*) and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program (42 U.S.C. 1381 *et seq.*). See 42 U.S.C. 1396a(a)(10)(A). The states may also choose to extend Medicaid coverage to other persons, termed the "medically needy," who would be eligible for

five general categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facility services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. 1396a (a) (13) (B) and 1396d(a) (1)-(5).

The Act does not expressly require that participating states pay for the cost of abortions or any other particular medical procedures,³ but the statute does provide that Medicaid beneficiaries must receive, at minimum, services within the categories specified above. A federal regulation under the Act provides that state Medicaid agencies "may not arbitrarily deny or reduce the amount, duration, or scope of a required service [*i.e.*, a service within any of the five mandatory categories] * * * to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. 440.230(c) (1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978). With respect to the persons eligible for Medicaid benefits and the level of payments available, the Act

AFDC or SSI payments if they did not have income or resources in excess of the statutory standards and who have insufficient income and resources to pay for necessary medical care. See 42 U.S.C. 1396a(a) (10) (C).

³ Indeed, when Title XIX was added to the Social Security Act in 1965 (79 Stat. 343), most "medically necessary" abortions were illegal in most states. *Roe v. Wade*, 410 U.S. 113, 118 & n.2 (1973). This Court's rulings in *Wade* and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), established the constitutional right of a woman to seek an abortion during the first trimester of pregnancy.

requires each state Medicaid plan to "include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX] * * *." 42 U.S.C. 1396a(a) (17) (A). An implementing regulation permits participating states to place reasonable limits on the amount of a particular kind of care that will be covered. 42 C.F.R. 440.230(b). The same regulation authorizes state agencies to "place appropriate limits on a service based on such criteria as medical necessity * * *." 42 C.F.R. 440.230(c) (2), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

In September 1976, Congress limited the availability of federal Medicaid funds to reimburse the cost of medically indicated or "therapeutic" abortions. Section 209 of Pub. L. No. 94-439, the appropriations act for the Department of Health, Education, and Welfare for fiscal year 1977, provided that "[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." 90 Stat. 1434. (This provision is commonly known as the Hyde Amendment, after its original congressional sponsor, Representative Henry J. Hyde of Illinois.) The following year, at least partially in response to the passage of the Hyde Amendment (see 79-5 J.S. 7), the Illinois legislature enacted similar measures designed to prohibit state medical assistance payments for abortions "unless, in the opinion of a physician, such procedures are neces-

sary for the preservation of the life of the woman seeking such treatment * * *." Ill. Ann. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Smith-Hurd 1979 Supp.). This limitation applies not only to the state's Medicaid program but also to two fully state-funded programs for persons ineligible to receive Medicaid benefits.⁴

2. In December 1977, within three weeks of the effective date of the new Illinois statute, two doctors whose medical practice includes performing abortions for indigent women filed this suit in the United States District Court for the Northern District of Illinois (A. 9-27). They proceeded on their own behalf and on behalf of all other "registered and licensed physicians in Illinois who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for medical services under the Illinois medical assistance programs" (A. 11).⁵ Plain-

⁴ The two Illinois medical assistance programs other than the Medicaid program are the General Assistance program, described in Ill. Ann. Stat. ch. 23, §§ 6-1 *et seq.* (Smith-Hurd 1968 and 1979 Supp.), and the Local Aid to the Medically Indigent program, described in Ill. Ann. Stat. ch. 23, §§ 7-1 *et seq.* (Smith-Hurd 1968 and 1979 Supp.).

⁵ The other named plaintiff was the Chicago Welfare Rights Organization, a nonprofit Illinois corporation whose members include women dependent on Illinois medical assistance benefits and "for whom abortions have been and will be medically necessary" (A. 11). In April 1978, plaintiffs filed an amended pleading (A. 93-96), adding as plaintiffs Jane Doe and all other indigent, pregnant women in Illinois "for whom an abortion is medically necessary, but not necessary for the

tiffs sought a declaration that the Illinois statute barring state medical assistance payments for any abortions except those necessary to preserve the life of a pregnant woman violates Title XIX of the Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. They also sought to enjoin enforcement of the Illinois statute. Plaintiffs argued that the Medicaid Act requires the funding of medically necessary abortions even if the woman's life is not in danger. They further contended that, by imposing restrictions on the availability of funds for medically necessary abortions but not for other medically necessary operations, the Illinois statute impermissibly distinguishes among groups of indigent women in need of medical care.

3. On December 7, 1977, the day after this lawsuit was filed in the district court, Congress passed a joint resolution providing appropriations for HEW for the last 10 months of fiscal year 1978 and including a modified version of the Hyde Amendment to govern the availability of federal Medicaid funds for abortions during that period. Pub. L. No. 95-205, 91 Stat. 1460; 123 Cong. Rec. S19439-S19446,

preservation of their lives, and who wish such abortions performed."

The principal defendant was Arthur F. Quern, Director of the Illinois Department of Public Aid, the agency charged with administering the State's medical assistance programs. Two doctors, appellants in No. 79-4, intervened as defendants (J.S. App. 2a-3a, 56a-58a).

H12769-H12776, H12827-H12831 (daily ed. Dec. 7, 1977).⁶ The modified Hyde Amendment listed two additional exceptions to the general prohibition against the use of appropriated funds for abortions. It stated:

[N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

This revised version of the Hyde Amendment was repeated in the HEW appropriations act for fiscal year 1979 (Pub. L. No. 95-480, 92 Stat. 1586) and was the law in effect at the time each of the district court and court of appeals decisions in the present case was rendered and at the time the current appeals were docketed in this Court.

In large measure because the Senate and the House of Representatives could not agree on whether this modified approach to federal funding for abortions

⁶ HEW appropriations for October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that simply continued in effect the original version of the Hyde Amendment passed the previous year. Pub. L. No. 95-130, 91 Stat. 1153; Pub. L. No. 95-165, 91 Stat. 1323.

should be retained for fiscal year 1980, Congress was unable to enact a new annual appropriations bill for HEW by the October 1979 deadline (see J.S. 6 n.3). Instead, on October 12, 1979, Congress adopted a joint resolution providing appropriations for HEW for the period ending November 20, 1979, and deleting the third exception in the modified Hyde Amendment language originally enacted in December 1977. Pub. L. No. 96-86, 93 Stat. 659, 662; 125 Cong. Rec. H9075-H9082, S14491-S14497 (daily ed. Oct. 12, 1979). The new appropriations measure stated:

[N]one of the Federal funds provided by this joint resolution * * * shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

After further debate, the same language was included in another joint resolution adopted by Congress on November 16, 1979, making appropriations for HEW for the remainder of fiscal year 1980. Pub. L. No. 96-123, 93 Stat. 925, 926; 125 Cong. Rec. S16882-S16885, H10953-H10960 (daily ed. Nov. 16, 1979). Thus, the currently effective statutory limitation on the use of federal Medicaid funds for abortions is somewhat different from that in effect when this lawsuit was filed (because of the addition of the "rape or incest" exception) and also from the version that governed at the

time of the decisions below (because of the deletion of the "severe and long-lasting physical health damage" exception).⁷

4. In response to appellees' challenge to the Illinois statute restricting the availability of state medical assistance payments for abortions, the district court initially announced its intention to abstain from considering the complaint until the Illinois state courts had construed the challenged legislation (J.S. App. 91a).⁸ The court of appeals reversed, concluding that abstention was inappropriate under all the circumstances, and remanded for consideration of appellees' motion for preliminary injunctive relief and for further proceedings (*id.* at 74a-90a). On remand, the district court certified two plaintiff classes in accordance with the requests filed by the plaintiff doctors at the time of the original complaint and by the plaintiff indigent pregnant women at the time of the April 1978 supplemental pleading (see page 6 and note 5, *supra*; A. 1, 3; J.S. App. 58a-62a).

The district court held that Title XIX of the Social Security Act and the regulations thereunder require

⁷ The recent change in the provisions of the Hyde Amendment does not affect the constitutional questions presented in this case (see pages 50-51, *infra*). The revision does, however, render it unnecessary for this Court to decide the statutory question presented by appellants in No. 79-4 (see pages 38-44, *infra*).

⁸ The district court apparently believed that the state statute's reference to medical procedures "necessary for the preservation of the life of the woman" might be construed to include all those abortions that appellees would label "medically necessary."

participating states to provide funding for all "therapeutic" or "medically necessary" abortions (J.S. App. 62a-67a). The court ruled that the modified version of the Hyde Amendment in effect in May 1978 was only a limitation on the use of federal funds and did not change the substantive requirements of the Medicaid Act (*id.* at 66a). Accordingly, the court permanently enjoined the enforcement of the Illinois statute to the extent it would have denied payments for abortions that are "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health" (*id.* at 66a-67a). Without stating its reasons for doing so, the district court applied its injunction to all three Illinois medical assistance programs (*ibid.*), even though, of course, only the State's Medicaid program is subject to the requirements of the federal Medicaid Act.

The court of appeals again reversed (J.S. App. 37a-53a). Following the decision of the First Circuit in a similar challenge to the Massachusetts abortion funding law,⁹ the court ruled that the Hyde Amendment "alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment" (*id.* at 42a-43a). The court remanded with instructions that the permanent injunction previously entered by the district court be

⁹ *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), cert. denied, No. 78-1430 (May 14, 1979).

modified to require payments only "for those abortions fundable under the Hyde Amendment" (*id.* at 51a). The court of appeals also directed the district court to rule expeditiously on the constitutional questions it had not reached. In particular, the court of appeals stated (*id.* at 50a-51a; footnote omitted) that the district court should consider

whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right.¹⁰

¹⁰ The court of appeals, perhaps accurately but without explanation, implicitly assumed that its statutory ruling would not cause Illinois to withdraw from the Medicaid program but that the State would prefer to continue its participation in the program on the condition that it provide payments for all abortions for which federal reimbursement is available under the Hyde Amendment. The court of appeals also concluded that the modified injunction requiring state payments for abortions fundable under the Hyde Amendment should apply to all three Illinois medical assistance programs, not just the Medicaid program (J.S. App. 51a-53a). Relying on a statement in the State's brief, the court found that the challenged Illinois Medicaid statute was intended to represent the State's understanding of the congressional purpose reflected in the original Hyde Amendment (*id.* at 52a & n.21). In light of this legislative background and the representation that "the vast majority of publicly funded abortions would come under the [Illinois] Medicaid plan rather than the purely state plans," the court expressed doubt that "the General Assembly would have imposed standards for funding from state plans which differ from the standards for Medicaid

5. On the second remand, the district court advised the Attorney General of the United States that the constitutionality of an Act of Congress had been drawn into question, and the United States intervened to defend the constitutionality of the Hyde Amendment, as it stood at the time (79-5 J.S. App. A19-A20). The district court observed (J.S. App. 5a-6a n.3) that the court of appeals had directed it "to pass on the constitutionality of the Hyde Amendment, even though plaintiffs attack only the legality of an Illinois statute." The court expressed some misgivings about the correctness of this procedure but remarked that the same reasoning that would govern the validity of the Illinois statute would also determine the outcome with respect to the Hyde Amendment (*ibid.*):

Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute, the same analysis applies to the Hyde

funding" (*id.* at 52a). The court also declared that "resolution of the constitutional issues will apply equally to the state-funded and the Medicaid-funded plans" (*id.* at 53a). For all these reasons, the court held that "the various provisions of the [1977 state] law should not be severed and that the modified injunction should apply to all publicly funded abortions [in Illinois]" (*ibid.*).

Amendment and the relief granted will encompass both laws.

The district court held that the Hyde Amendment and the Illinois statute are unconstitutional to the extent that they deny funding for "medically necessary abortions prior to the point of fetal viability" (J.S. App. 21a, 24a-27a). The court determined on the basis of doctors' affidavits that "[m]ost health problems associated with pregnancy would not be covered" even by the comparatively liberal second version of the Hyde Amendment and "those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother" (*id.* at 17a). The court inferred that if Medicaid funds are available only for those abortions covered by the Hyde Amendment, "[t]he effect * * * will be to increase substantially maternal morbidity and mortality among indigent pregnant women" (*ibid.*). In addition, the court observed that the Hyde Amendment criteria "completely ignore the very serious threats to an indigent pregnant woman's psychological or psychiatric health that may make an abortion medically necessary" (*id.* at 17a-18a n.11). The court concluded (*id.* at 20a) that

a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective in-

terests involved" shift, thereby legitimizing the state's interest. After that point, therefore, * * * a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations.

Accordingly, the court enjoined defendant Quern from enforcing the Illinois statute to deny payment under the state medical assistance programs for "medically necessary abortions performed prior to fetal viability" (*id.* at 27a). The court did not enjoin any action by the United States.¹¹

SUMMARY OF ARGUMENT

I

A. This Court has jurisdiction over these appeals because the requirements of 28 U.S.C. 1252 are satisfied. The district court has held an Act of Congress unconstitutional in a civil suit to which the United States is a party (by virtue of its intervention under 28 U.S.C. 2403).

¹¹ The district court refused to stay its order, and defendant Quern and the intervening doctors moved in this Court for a stay pending appeal (Nos. A-958 and A-967). On May 24, 1979, Mr. Justice Stevens denied the motions on the ground that the likely irreparable injury to the plaintiffs in the event a stay were granted outweighed the injury that the State would suffer if the district court's decision were permitted to remain in effect pending appeal. The intervening doctors then applied for a stay to Mr. Justice Rehnquist. He referred the application to the Court, which denied it on June 4, 1979.

B. The district court lacked jurisdiction to decide the constitutionality of the Hyde Amendment, because no party attacked the validity of the federal statute and appellees could have been awarded all the relief they sought solely on the basis of the district court's ruling with respect to the challenged Illinois law. Insofar as the constitutionality of an Act of Congress was concerned, therefore, appellees' complaint presented no case or controversy sufficient to permit an exercise of the judicial power conferred by Article III of the Constitution. Although the district court's lack of authority to rule on the Hyde Amendment does not deprive this Court of appellate jurisdiction under Section 1252 (see *McLucas v. De-Champlain*, 421 U.S. 21, 31-32 (1975)), it does mean that the Court should not address the merits of the district court's decision on the federal statute, but instead should vacate that portion of the judgment concerning the Hyde Amendment.

C. In circumstances where the Court determines that a district court lacked jurisdiction to declare an Act of Congress unconstitutional, we believe that the Court ordinarily should not proceed to decide the remaining questions presented on appeal, even though *McLucas* indicates that it would have the power to do so. When a direct appeal is taken to this Court only because a district court improperly addressed the constitutionality of a federal statute, it should not provide the occasion for the Court to resolve other questions that by themselves could not justify an exercise of appellate jurisdiction under Section 1252.

See, e.g., *FHA v. The Darlington, Inc.*, 352 U.S. 977 (1957) (not considering question of statutory and contract interpretation after concluding that three-judge district court was required to rule on constitutionality of federal statute). This general rule seems especially appropriate where, as here, there is no case or controversy regarding the question on which the appeal is based, and hence this Court, like the court below, lacks power to decide the merits of the constitutional question whose prompt resolution Congress thought desirable. In such a situation it would be peculiar if the Court were to rule solely on other issues in the case not deserving of such special judicial attention.

Notwithstanding these general principles, this case is one in which the Court should decide the remaining questions presented on appeal, even if it concludes that the constitutionality of an Act of Congress is not directly in dispute. The Illinois funding restrictions applicable to medically necessary abortions raise important social and legal questions that warrant resolution by this Court. The validity of the state statute turns on precisely the same constitutional considerations that govern the validity of the Hyde Amendment. Moreover, the competing considerations have been canvassed in several lower court opinions and have been fully briefed in this Court. A delay would only postpone the consideration on the merits that appears inevitable and would thereby contribute to further repetitive litigation in the lower federal courts.

D. Although this Court's decisions establish that a proper appeal under Section 1252 brings "the whole case" before the Court, that phrase does not comprehend questions not decided by or comprised within the judgment under review. In an appeal under Section 1252, the Court may consider any matters resolved by the judgment below and any alternative grounds on which that judgment could be supported. See, e.g., *Fusari v. Steinberg*, 419 U.S. 379, 387-388 n.13 (1975). This does not mean, however, that the Court may properly consider every question previously decided by any court in the history of a given litigation. In particular, the statutory question presented by appellants in No. 79-4 is not open to review on these appeals. The question whether the Medicaid Act requires participating states to pay for all medically necessary abortions for which federal reimbursement is available was finally resolved by the court of appeals in February 1979, and that court's affirmative answer was simply assumed by the district court in rendering its constitutional decision. Appellants in No. 79-4 did not seek review of the court of appeals' ruling, and they cannot use these appeals as a means by which to obtain further consideration of a question that has no bearing on the correctness of the judgment now before the Court.

In any event, the recent change in the Hyde Amendment has effectively mooted the statutory question presented in No. 79-4. There is now only one category of abortions—abortions for the victims of promptly reported rape or incest—for which federal

funds are available but state funding would be denied under the Illinois statute. No plaintiff has explicitly asserted an interest in compelling Illinois to pay for such abortions, and the State itself has never sought review of the court of appeals' holding that it must pay for all abortions for which federal monies are available. Under these circumstances, the Court should not consider the question of statutory interpretation presented in No. 79-4.

II

The court of appeals correctly held that the Medicaid Act imposes no obligation on participating states to fund medical procedures for which federal financial assistance is not available. The federal statute establishes a cooperative program for providing medical services to the needy; the primary feature of that program is joint federal-state funding. When Congress has refused to expend federal monies for a particular service, even one that would otherwise be covered by the Act, states are not required, as a condition of their continuing participation in the program, to assume full financial responsibility for the care or treatment abandoned by Congress.

This interpretation of the Medicaid Act is fully consistent with the legislative history of the Hyde Amendment. As the court of appeals observed (J.S. App. 46a), the Members of Congress who debated the several versions of the Hyde Amendment understood that the Amendment, by withholding federal funds for certain abortions, would relieve participating states of whatever statutory obligation they might

otherwise have had to pay for such abortions. For this reason, the Illinois law, to the extent it denies payment for abortions that the federal government will not fund as a result of the Hyde Amendment, does not violate the Medicaid Act.

III

A. The recent legislative change in the provisions of the Hyde Amendment does not affect the constitutional arguments that control in this case. Accordingly, the Court need not defer ruling on the validity of the Illinois statute until the district court has had an opportunity to consider the impact of the congressional revision of the Amendment for fiscal year 1980. The district court held that neither the federal nor the state government can properly refuse Medicaid funding for medically necessary abortions prior to fetal viability. The current version of the Hyde Amendment is somewhat more restrictive than that reviewed by the district court, and hence the court's reasoning would apply fully to the legislation now in force. On the other hand, if Illinois and the federal government are correct in believing that the legitimate legislative interest in encouraging childbirth provides a rational explanation for the abortion funding limitations contained in the 1979 version of the Hyde Amendment, that same interest will support the more restrictive measure.

B. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court held that legislative decisions to limit the availability of public funds for abortions must be sus-

tained if they bear a rational relationship to a legitimate government purpose. Restrictions on the amount of public monies earmarked for the performance of a particular medical service do not impinge on any "fundamental right" or establish any "suspect classification" that would warrant strict judicial scrutiny. The Constitution does not require the state or federal government to pay for pregnancy-related medical services for indigent women or, indeed, to pay for any medical expenses for indigents. As a consequence, Congress and the state legislature are free, in distributing publicly-funded medical assistance, to draw distinctions among different services and forms of treatment, as long as there is some rational basis for the legislative judgment. This constitutional standard does not change merely because a legislature chooses to distinguish among medically necessary services rather than between such services generally and one or more "elective" procedures, such as nontherapeutic abortions.

C. The Hyde Amendment and the Illinois statute challenged in this case are rationally related to two legitimate legislative concerns: the desire to encourage childbirth and to protect the potentiality of human life, and the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. As this Court has observed, the federal and state governments have an "important and legitimate interest in protecting the potentiality of human life." *Roe v. Wade*, 410 U.S. 113, 162 (1973). This interest exists, not only after fetal

viability, but "throughout the course of the woman's pregnancy." *Beal v. Doe*, 432 U.S. 438, 446 (1977). In deciding whether to appropriate public funds for abortions, a legislature may appropriately weigh its interest in the potential life of the fetus against the competing interest in protecting maternal health. Congress and the Illinois General Assembly have considered these disparate interests and have concluded that, except where the mother's life would be endangered by carrying the pregnancy to term, the interest in encouraging childbirth and preserving fetal life should prevail. This legislative choice is rational.

The district court's decision to the contrary merely reflects disagreement with the weights assigned to the competing values by Congress and the state legislature. During the period before fetal viability, the district court would assign greater relative significance to the interest in maternal health than either legislative body thought proper. To be sure, a reviewing court may question the wisdom of this legislative action and may even conclude, as a policy matter, that a different course would have been preferable. But a judgment of this kind is not a sufficient reason for invalidating the considered policy decision of the elected representatives of the public. "[W]hen an issue involves policy choices as sensitive as those implicated [here] * * *, the appropriate forum for their resolution in a democracy is the legislature." *Maier v. Roe, supra*, 432 U.S. at 479.

The federal and state governments may legitimately treat abortion differently from other medically neces-

sary services because only abortion involves the termination of a potential human life. *Maier v. Roe, supra*, 432 U.S. at 480. This Court has specifically acknowledged that "not all distinction between abortion and other procedures is forbidden." *Bellotti v. Baird*, 428 U.S. 132, 149 (1976). Whether an abortion is sought before or after fetal viability, the special characteristics of the procedure provide a rational basis for the imposition of funding restrictions not applicable to other medical services.

ARGUMENT

I

THIS COURT HAS JURISDICTION OVER THE PRESENT APPEALS UNDER 28 U.S.C. 1252, BUT THE DISTRICT COURT LACKED AUTHORITY TO DECIDE THE CONSTITUTIONALITY OF A FEDERAL STATUTE ABOUT WHICH THERE WAS NO CASE OR CONTROVERSY AMONG THE PARTIES

The first jurisdictional question raised by appellees concerns the propriety of the district court's decision, following the instructions issued by the court of appeals, to adjudicate the constitutionality of the Hyde Amendment.¹² See Motion to Vacate in Part, to Dismiss in Part, and to Affirm 6-9. Appellees do not contend that this Court lacks jurisdiction over the present appeals under 28 U.S.C. 1252. They argue

¹² Unless otherwise indicated, references to the Hyde Amendment in the remainder of this brief denote the version of the Amendment in effect from December 1977 until October 1979.

only that this Court should not resolve the validity of the Hyde Amendment, because that question was not raised by the parties in the district court and because the district court's ruling on the federal statute was not necessary to its judgment regarding the Illinois statute. Appellees further assert (Motion to Vacate 8-9 n.***) that, despite the absence of a case or controversy over the constitutionality of the Hyde Amendment, the appeals from the district court's ruling on that question confer jurisdiction on this Court to review the remaining aspects of the judgment below, even though the district court's decision on the Illinois statute alone could not have been appealed directly to this Court. Finally, appellees contend (Motion to Vacate 25-33) that these appeals do not properly present the statutory interpretation question raised by appellants in No. 79-4 (79-4 J.S. 23-25) and decided by the court of appeals (J.S. App. 37a-53a) prior to the district court's constitutional ruling.

We agree with appellees' assertions concerning the Court's jurisdiction over the constitutional aspects of the case and also with their conclusion that the Court should not address the statutory question raised in No. 79-4. Not only does the Court lack jurisdiction over the latter question, but congressional revision of the Hyde Amendment since the district court's judgment has effectively mooted the issue, at least as far as this lawsuit is concerned.

A. The Jurisdictional Requirements for an Appeal Under 28 U.S.C. 1252 Are Satisfied in This Case

The starting point for any discussion of the Court's jurisdiction in this case is the language of 28 U.S.C. 1252. That statute authorizes any party to appeal to this Court "from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States * * * is a party."

These requirements plainly are satisfied here. The final judgment of the district court held the Hyde Amendment, an Act of Congress, unconstitutional. The judgment was rendered in a civil suit to which the United States was a party by virtue of its intervention in accordance with 28 U.S.C. 2403(a).¹³

¹³ Section 2403(a) provides:

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

When appellants in Nos. 79-4 and 79-5 applied to this court for a stay of the district court's judgment (see note 11, *supra*), appellees responded in part by suggesting that, when the United States intervenes in accordance with Section

Hence, this Court has jurisdiction over these appeals under Section 1252. See *McLucas v. DeChamplain*, 421 U.S. 21, 30-31 (1975).

B. The District Court's Judgment Should be Vacated to the Extent It Invalidates the Hyde Amendment, Because There Is No Case or Controversy Among the Parties With Respect to the Federal Statute

A substantial question remains, however, concerning the district court's power to decide the constitutionality of the Hyde Amendment in this case. It is settled that this Court's appellate jurisdiction under 28 U.S.C. 1252 is not defeated because the court from which the appeal is taken lacks jurisdiction to pass on the validity of the federal statute involved. Appeal to this Court is proper under Section 1252 even if the lower federal court that holds an Act of Congress unconstitutional is without power to do so. *McLucas v. DeChamplain*, *supra*, 421 U.S. at 31-32. The question of the lower court's jurisdiction *vel non* is, however, quite relevant to the proper disposition of the case, once an appeal has been taken to this Court. For example, the Court has held that, if a

2403(a), it does not become a party for purposes of the jurisdictional requirement in 28 U.S.C. 1252. See Memorandum In Opposition to Appellants' Application for a Stay 8. Appellees have not repeated this argument in response to the jurisdictional statements filed in this Court, and in any event the contention is without merit. See *Fleming v. Rhodes*, 331 U.S. 100, 103 (1947); R. Stern and E. Gressman, *Supreme Court Practice* 77 (5th ed. 1978); C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4037, at 56-57 (1978); 9 *Moore's Federal Practice* ¶ 110.03[5], at 95-96 & n.2 (2d ed. 1975).

single district judge has invalidated a federal statute in a case in which a three-judge district court should have been convened, the Court will, on appeal under Section 1252, vacate the judgment below and remand the case for consideration by a three-judge district court. *FHA v. The Darlington, Inc.*, 352 U.S. 977 (1957); *Flemming v. Nestor*, 363 U.S. 603, 606-607 (1960). Thus, although an appeal in such circumstances is proper under Section 1252,¹⁴ the Court ordinarily will refuse to review the merits of a decision that the lower court lacked power to render under the Constitution or applicable jurisdictional statutes.

This principle should control the Court's disposition of the district court's ruling on the validity of the Hyde Amendment. Appellees have steadfastly maintained,¹⁵ and the district court agreed (J.S. App. 5a-6a n.3), that at no time in this lawsuit have they or any other party challenged the constitutionality of the federal statute. Appellees' complaint and all their arguments in the district court and the court of appeals have been addressed solely to the Illinois statute limiting payments for abortions under the state medi-

¹⁴ Indeed, a direct appeal under Section 1252 is the exclusive appellate remedy in such circumstances, because 28 U.S.C. 1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court."

¹⁵ See Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction 3 & n.* (Mar. 22, 1979); Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment and for an Injunction 1 n.* (Apr. 3, 1979); 79-64 Pet. 25-26; Motion to Vacate 6-7.

cal assistance programs. Even after the court of appeals injected the Hyde Amendment issue into the case and instructed the district court to consider the Amendment's validity, appellees did not seek to amend their complaint to obtain relief against the federal statute. Indeed, appellees insisted in the district court on remand that they sought "no relief with respect to the Hyde Amendment, or against any federal official" and that "nothing in [their] claim for relief require[d] th[e] [c]ourt to decide the constitutionality of the Hyde Amendment." Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction 3 & n.* (Mar. 22, 1979). Appellees explicitly stated that the only relief they sought was a "judgment that the Illinois abortion funding policy violates the Fourteenth Amendment, and an injunction requiring state funding of all therapeutic abortions under the Illinois medical assistance program" (*id.* at 3).¹⁶

To be sure, as appellees and the district court acknowledged, the same reasoning that supports appellees' attack on the constitutionality of the Illinois law also applies to the Hyde Amendment. But the fact remains that the Hyde Amendment was not the subject of appellees' grievance, and they could have been awarded all the relief they sought without any judicial ruling on the validity of the federal statute. The court of appeals in the present case therefore

¹⁶ See Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction 3 & n.* (Mar. 22, 1979); J.S. App. 6a n.3.

erred in instructing the district court to adjudicate the validity of a federal law about which there was no dispute among the parties. The judicial power of the federal courts under Article III of the Constitution extends only to actual cases and controversies, and the district court, accordingly, lacked authority to render a judgment and advisory opinion on the constitutionality of the Hyde Amendment. Thus, to the extent that the court's decision purports to review the validity of the Hyde Amendment and pass on its merits, the judgment should be vacated. See, *e.g.*, *C.I.O. v. McAdory*, 325 U.S. 472 (1945); *United States v. Johnson*, 319 U.S. 302 (1943); *Muskrat v. United States*, 219 U.S. 346 (1911).

C. This Court Should Review the Remainder of the District's Court's Judgment, Even Though That Judgment is Appealable Under Section 1252 Only Because The District Court Mistakenly Decided A Question As to Which There Was No Case or Controversy

If, as we have argued above, the Court must vacate the district court's judgment holding the Hyde Amendment unconstitutional because of the absence of a case or controversy, the critical jurisdictional question then becomes whether the Court should proceed to review the remaining aspects of the decision below or whether it instead should remand the case for whatever further proceedings might be appropriate (*e.g.*, an appeal to the court of appeals).¹⁷

¹⁷ Appellants in Nos. 79-4 and 79-5 and appellees all filed timely notices of appeal to the court of appeals in May 1979. Appellants in No. 79-4 filed their notices of appeal to this

The general rule established by this Court's decisions is that a proper appeal under 28 U.S.C. 1252 brings "the whole case," not just the part involving the constitutionality of an Act of Congress, before the Court. *McLucas v. DeChamplain*, *supra*, 421 U.S. at 31-32; *Fusari v. Steinberg*, 419 U.S. 379, 387-388 n.13 (1975); *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960). See R. Stern and E. Gressman, *Supreme Court Practice* 78 (5th ed. 1978); C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4037, at 52 (1978); 9 *Moore's Federal Practice* ¶ 110.03[5], at 96 (2d ed. 1975). The implication of this rule is that, once a proper appeal has been taken under Section 1252, this Court may review

Court and the court of appeals on the same day. Appellant in No. 79-5 filed his notice of appeal to the court of appeals on May 21, 1979, several days after his notice of appeal to this Court had been filed. The effectiveness of the notices of appeal to the court of appeals may be problematical because of the last two sentences of 28 U.S.C. 1252, which provide:

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

If this Court decides that it should not reach those aspects of the district court's judgment not dealing with the constitutionality of the Hyde Amendment, it would be appropriate to remand for the entry of a fresh decree addressed only to the validity of the Illinois statute. This action would enable the parties to appeal the new district court order to the court of appeals and would eliminate any question about the timeliness of their earlier notices that review would be sought in the Seventh Circuit. See *United States v. Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972).

all facets of the decision below, even if the precise portion of the challenged ruling that supports the Court's appellate jurisdiction was beyond the power of the lower court to render.

This line of reasoning entails a substantial difficulty because it means not only that the Court can decide questions on appeal (and perhaps, as here, on direct appeal from a district court) even though those questions by themselves could not justify an invocation of the Court's appellate jurisdiction, but also that the Court can do so solely because a lower federal court has erroneously concluded that it should address the constitutionality of a federal statute. Indeed, this Court's references to its power to review "the whole case" on appeal under Section 1252 might even suggest that the Court should routinely decide the remaining questions in a direct appeal even where (as here) it lacks power (because of Article III limitations) to resolve the validity of an Act of Congress on the merits.

Appellees assert (Motion to Vacate 8-9 n.**), without any mention of this problem, that "when remaining issues are sufficient to make the case justiciable, the Court retains jurisdiction to pass upon them, even where the issues deemed not justiciable are the ones upon which this Court's jurisdiction was originally invoked." The two cases cited by appellees in support of this proposition, however, are inapposite. In *United States v. Raines*, *supra*, 362 U.S. at 27-28, the Court did not suggest that the district court had improperly addressed the constitutional issue that formed the

basis of the government's appeal. Moreover, it does not appear that, in reversing the district court's constitutional ruling in that case, this Court also considered other questions that by themselves could not have been raised on appeal. In *Farmers & Mechanics National Bank v. Wilkinson*, 266 U.S. 503 (1925), the Court simply held that it lacked appellate jurisdiction and therefore dismissed the appeal; it did not decide any question on the merits.

We have been unable to find any decision in which the Court has explained the appropriate manner of disposing of the remaining questions on appeal once the Court has concluded that, for jurisdictional reasons (such as the absence of a case or controversy about the validity of an Act of Congress), the district court or the court of appeals should not have addressed the constitutional question that is the basis of an appeal under Section 1252. The precedent most nearly on point is *McLucas v. DeChamplain*, *supra*. There, the Court ruled first that it had appellate jurisdiction under Section 1252 whether or not the single-judge district court had jurisdiction to enter the challenged preliminary injunction. The Court then vacated the injunction and dismissed plaintiff's constitutional claim on the merits, without deciding whether a single district judge, or only a three-judge district court, could properly have entered the injunction sought by the plaintiff. The Court also resolved an additional question regarding the proper scope of the plaintiff's access to records and documents from an earlier court-martial proceeding (421 U.S. at 33-

34), even though that question ~~by~~ itself could not have been grounds for a direct appeal.

McLucas is distinguishable from the present case in at least two ways: (1) it involved a close question regarding the district court's jurisdiction, the answer to which would have been clear if the case had arisen later, after a decision of this Court that was announced between the time of the district court's injunctive order and this Court's subsequent review in *McLucas*;¹⁸ here, by contrast, the lack of an Article III case or controversy regarding the Hyde Amendment is reasonably plain and not complicated by other litigation; and (2) the jurisdictional defect affecting the district court's preliminary injunction

¹⁸ Relying on an earlier court of appeals' decision then pending on appeal to this Court, the single-judge district court in *McLucas* issued a preliminary injunction on the theory that the unconstitutionality of the challenged statutory provision was sufficiently clear that the convening of a three-judge district court was not necessary under 28 U.S.C. (1970 ed.) 2282. See *Bailey v. Patterson*, 369 U.S. 31 (1962). While the district court's preliminary injunction in *McLucas* was pending on appeal to this Court, the Court reversed the court of appeals' decision on which the district court had relied. *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974), rev'g 477 F.2d 1237 (D.C. Cir. 1973). Appellee in *McLucas* then argued that this Court's decision in *Avrech* demonstrated that the constitutional question presented to the district court in *McLucas* was not sufficiently clear to be decided by a single judge under *Bailey* and that, since a three-judge district court should have been convened, this Court lacked appellate jurisdiction under Section 1252. The Court disagreed and, following *Avrech*, dismissed appellee's complaint on the merits without deciding whether the single judge had jurisdiction to enter the preliminary injunction.

in *McLucas*, if there was one, was the product of highly technical statutes governing three-judge district courts (cf. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974)); here, the jurisdictional defect in the district court's judgment regarding the Hyde Amendment stems from the Article III preclusion of judicial power to decide questions in the absence of an actual case or controversy. Unlike the possible jurisdictional problem in *McLucas*, the jurisdictional defect in the present case applies to this Court as well as the district court; in the absence of a case or controversy, this Court is no more authorized to decide the constitutionality of the Hyde Amendment than was the court below.

The most that can be gleaned from *McLucas*, then, is that this Court is *empowered* to review the merits of additional questions presented on appeal from constitutional rulings rendered by lower federal courts without jurisdiction to address the validity of a federal statute. The case does not establish that in every instance the Court *should* decide such additional questions. Indeed, as a general rule, we believe that the better approach is the contrary. When, on direct appeal of a judgment of a district court under Section 1252, this Court determines that an error in the court below precludes consideration of the constitutionality of an Act of Congress, the rationale for congressional authorization of such appeals disappears. Under such circumstances, any remaining questions decided by the district court should ordinarily be left for another day. Either such matters can be reviewed initially in

the court of appeals (to which an appeal could have been taken if the district court had not addressed the constitutionality of a federal statute), or they can return to this Court together with the constitutional question once the defects in the district court's resolution of the latter have been cured. This approach would serve the dual purposes of limiting the exercise of this Court's jurisdiction under Section 1252 to those cases for which it was intended and avoiding the splitting of appeals in cases in which a federal statute is invalidated.¹⁹

¹⁹ *FHA v. The Darlington, Inc.*, *supra*, provides an example of the appropriate procedure. In that case, plaintiff challenged the constitutionality of an Act of Congress. The Federal Housing Administration defended the statute but also presented a statutory argument the acceptance of which would have made it unnecessary to reach the constitutional question. A single-judge district court rejected the FHA's statutory argument, held the challenged statute unconstitutional, and enjoined its operation. The FHA appealed to this Court and presented three reasons why the district court's judgment was erroneous: (1) the statutory argument; (2) the constitutional argument; and (3) the argument that it was improper for a single-judge district court to enter an injunction against the operation of a federal law. This Court agreed that a three-judge district court should have been convened; it therefore reversed the judgment of the single judge and remanded for further proceedings. 352 U.S. 977. The Court did not consider the FHA's statutory argument at that time, even though it presumably had jurisdiction to do so under the "whole case" doctrine. On remand, the three-judge district court adhered in substance to the conclusions reached earlier by the single judge. The FHA again took a direct appeal, and this Court then reviewed both the statutory and the constitutional issues. 358 U.S. 84 (1958).

Notwithstanding these salutary general principles, however, we believe that the present case is one in which the Court should proceed to decide the remaining questions raised by the district court's judgment, even if it is not obligated to do so. The constitutionality of the Illinois statutory limitations on public funding for "medically necessary" abortions is a significant federal question that deserves resolution by this Court. Similar measures have been enacted in several other states, and, together with the federal statute, they have provoked substantial litigation in the federal courts. See, *e.g.*, *Califano v. McRae*, 433 U.S. 916 (1977), vacating and remanding 421 F. Supp. 533 (E.D. N.Y. 1976); *Hodgson v. Board of County Commissioners*, No. 79-1665 (8th Cir. Jan. 9, 1980); *Reproductive Health Services v. Freeman*, No. 79-1275 (8th Cir. Jan. 9, 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), cert. denied, No. 78-1430 (May 14, 1979); *Doe v. Kenley*, 584 F.2d 1362 (4th Cir. 1978); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405 (D. Conn. Jan. 7, 1980); *Planned Parenthood Affiliates v. Rhodes*, 477 F. Supp. 529 (S.D. Ohio 1979); *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979); *Baird v. King*, Civ. No. 79-1132-N (D. Mass. Oct. 11, 1979); *Doe v. Percy*, No. 79-C-367 (W.D. Wis. Sept. 13, 1979); *Roe v. Casey*, 464 F. Supp. 487 (E.D. Pa. 1978); *Woe v. Califano*, 460 F. Supp. 234 (S.D. Ohio 1978); *D— R— v. Mitchell*, 456 F. Supp. 609 (D. Utah 1978), appeal pending, No. 78-1675 (10th Cir.); *Smith v. Ginsberg*, No. 75-0380 CH (S.D. W. Va. May 9, 1978); *Doe v.*

Mundy, 441 F. Supp. 447 (D. Wis. 1977); *Doe v. Mathews*, 422 F. Supp. 141 (D.D.C. 1976); *Doe v. Mathews*, 420 F. Supp. 865 (D. N.J. 1976). Congress has included one or another version of the Hyde Amendment in HEW appropriations measures for four consecutive fiscal years, and there appears to be little likelihood that such funding restrictions will disappear in the near future or will cease to generate further lawsuits.

The constitutional issues raised by the federal and state statutes are identical. If the Court declines to hear these issues and remands to the district court for the entry of a fresh decree (see note 17, *supra*), the appellants (other than the United States) undoubtedly would pursue an appeal to the Seventh Circuit. And if the Seventh Circuit were to affirm, appellants could then exercise their right of appeal to this Court pursuant to 28 U.S.C. 1254(2). If the Seventh Circuit were to reverse, appellees almost certainly would seek further review here. Hence, a decision not to decide the merits of these constitutional issues at this stage, although they have been fully briefed and argued, might succeed only in delaying for a substantial time this Court's ultimate resolution of a recurring question of substantial practical importance. In light of the number of cases already decided on the subject, such a delay would be unlikely to provide the Court with any significant additional assistance in identifying the relevant questions and refining the competing contentions. For these reasons, we believe that the Court should proceed to consider the validity of the Illinois statute even if it

determines that the district court's judgment concerning the federal statute must be vacated for lack of jurisdiction.²⁰

D. The Court Lacks Jurisdiction, on the Present Appeals from the District Court's April 1979 Judgment, to Consider Aspects of the Court of Appeals' Earlier Statutory Decision That Do Not Provide Alternative Grounds on Which to Support the Judgment Under Review

Appellants in No. 79-4 urge the Court to consider whether the Medicaid Act requires states participating in the Medicaid program to fund all "medically necessary" abortions for which federal contribution is available under the Hyde Amendment (79-4 J.S. 23-25). The court of appeals answered that question affirmatively in February 1979 (J.S. App. 40a-42a).²¹ At the same time, the court remanded the

²⁰ There is some danger, at least in theory, that gratuitous rulings by district courts on the constitutionality of federal statutes will permit unjustified invocations of this Court's appellate jurisdiction to decide questions that ordinarily could not be presented on direct appeal. This has not been a problem in the past; if, as a result of the Court's decision in this case, some difficulty arises in the future, it can be handled adequately at that time. The district court in the present case did not rule on the Hyde Amendment in order to create appellate jurisdiction in this Court; it decided the question because the court of appeals instructed it to do so. The district court was plainly obligated to review the constitutionality of the Illinois statute, and all parties agree that the legal arguments relevant to the validity of the state law also control with respect to the Hyde Amendment.

²¹ Appellant in No. 79-5, the state official responsible for administering the Illinois medical assistance programs, has never sought review in this Court of any aspect of the court of appeals' statutory decision.

case for a determination whether appellees were entitled to further relief on constitutional grounds from the abortion funding restrictions imposed by Illinois law.

The district court's judgment on remand is the subject of the present appeals. Neither appellants in No. 79-4 nor any other party sought review in this Court from that portion of the court of appeals' judgment holding the Illinois statute invalid to the extent it refused payment for medically necessary abortions that would be funded by the federal government under the Medicaid Act and the Hyde Amendment. Consequently, appellees contend (Motion to Vacate 25-33), this Court now lacks jurisdiction to review the challenged aspect of the court of appeals' holding. We believe that appellees' jurisdictional argument on this point is correct; in any event, we believe that the Court should refrain from deciding the statutory question presented in No. 79-4 because the issue has essentially been mooted by the recent congressional revision of the Hyde Amendment.

As already discussed (see page 30, *supra*), a proper appeal under 28 U.S.C. 1252 brings "the whole case" before the Court. *McLucas v. DeChamplain*, *supra*, 421 U.S. at 31; *Fusari v. Steinberg*, *supra*, 419 U.S. at 387-388 n.13; *United States v. Raines*, *supra*, 362 U.S. at 27 n.7. Appellees acknowledge these precedents (Motion to Vacate 29 & n.***) but maintain that the words "whole case" refer only to those questions "passed upon by [a lower federal court] in the process of 'holding an Act of Congress uncon-

stitutional,' * * * or to matters which might provide alternative grounds for affirmance of that decision," or to threshold jurisdictional issues (*id.* at 29-30). Appellees then state that Section 1252 does not confer jurisdiction to review questions decided in a particular case by a court other than the one from which the appeal to this Court is taken. They argue that a construction of Section 1252 that would permit the Court to assert jurisdiction over the statutory question presented in No. 79-4 would mean that, in any appeal from a decision holding an Act of Congress unconstitutional, the Court could "review any final judgments previously rendered in the same case, even if they were entered years before, and never appealed" (*id.* at 30).

While appellees' phrasing of their position may involve some hyperbole, the substance of their position is accurate as applied to this case. To be sure, this Court has ruled that an appeal under Section 1252 "brings the whole case before the Court[, including] * * * issues that might provide alternative grounds for support of the District Court judgment" (*Fusari v. Steinberg, supra*, 419 U.S. at 388 n.13). But the district court's judgment that the Illinois statute is unconstitutional does not include, either specifically or by necessary implication, any ruling on whether a state participating in the Medicaid program must pay for all medically necessary abortions for which federal funds are available under the Hyde Amendment. That matter was resolved by the court of appeals several weeks before the district

court's decision, and the appellate court's conclusion was simply assumed by the district court in rendering its constitutional ruling. Whatever might have been the outcome of the district court's constitutional inquiry, it would not have changed Illinois' obligation, under the earlier court of appeals holding, to fund all medically necessary abortions for which federal reimbursement is available under the Hyde Amendment.

Thus, the judgment now before this Court specifically states (J.S. App. 23a): "The District Court's previous May 15, 1978 Judgment and its June 13, 1978 Judgment, as modified by this February 15, 1979 Order, remain in force." In addition, the succeeding paragraphs of the court's April 1979 judgment make clear that the court then decided only the constitutionality of "Illinois' restrictive abortion funding policy," a phrase the court defined (J.S. App. 24a) to mean "the policy Illinois adopted pursuant to * * * Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as modified by the District Court Order of February 15, 1979," *i.e.*, the challenged Illinois statute as modified to reflect the court of appeals' holding that, as a participant in the Medicaid program, Illinois is obliged to pay for all medically necessary abortions for which federal contribution is available. The statutory question raised in No. 79-4 is therefore not included within the judgment from which the appeals to this Court were taken. Appellants in No. 79-4 could have sought review of the court of appeals' statutory decision by docketing an appeal under 28 U.S.C. 1254(2) or by filing a petition for a

writ of certiorari under 28 U.S.C. 1254(1). They did not do so, and they cannot now cure their failure by raising the matter on appeal under 28 U.S.C. 1252 from a different judgment resolving different issues.²²

In any event, the recent congressional revision of the Hyde Amendment for fiscal year 1980 (see page 9, *supra*) has effectively eliminated the practical significance of the statutory question presented in No. 79-4, at least as far as the parties to this litigation are concerned. By deleting the portion of the Hyde Amendment that permitted federal payments for abortions in "those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term," Congress has reduced to one the number of categories in which the court of appeals' decision would compel Illinois, as a Medicaid participant, to pay for abortions that would not be funded under the Illinois statute as enacted by the state legislature. The single remaining category includes only medically necessary abortions "for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service."

In light of the current version of the Hyde Amendment, the statutory issue raised in No. 79-4 is reduced

²² The jurisdictional statement in No. 79-4 cannot be considered a petition for certiorari to review the Seventh Circuit's judgment on the statutory question. See 28 U.S.C. 2103. In addition to the problems mentioned by appellees (see Motion to Vacate 28 n.*), the "petition" was filed more than 90 days after the court of appeals' judgment and is therefore untimely under 28 U.S.C. 2101(c).

to the question whether Illinois is compelled by Title XIX to pay for medically necessary abortions for persons who are the victims of rape or incest. But none of the appellees in this case has asserted any personal stake in the resolution of this question, and the classes certified by the district court do not explicitly include the victims of rape or incest. See J.S. App. 8a n.6. No indigent pregnant appellee has alleged that she falls in that category of persons denied funding under state law, and no appellee physician has alleged that he or she wishes to perform an abortion for a person falling in that category. The final question presented in the jurisdictional statement in No. 79-4 is therefore not only beyond the bounds of this Court's jurisdiction under Section 1252, but it also has been rendered moot, with respect to the parties in this case, by congressional action occurring since the docketing of these appeals.²³

²³ If the Court should nevertheless decide to address the question whether Illinois must fund all medically necessary abortions for which federal reimbursement is available under the Hyde Amendment, it should answer the question affirmatively and sustain the decision of the court of appeals. In establishing the Medicaid program in 1965, Congress required participating states to pay, at minimum, for services in five mandatory categories, including inpatient and outpatient hospital services and physicians' services. 42 U.S.C. 1396a(a)(13)(B), (C), 1396d(a)(1)-(5). In light of the importance Congress attached to the provision of services within the mandatory categories (see S. Rep. No. 404, 89th Cong., 1st Sess. 80 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess. 70 (1965)), the Secretary of HEW has interpreted the Medicaid Act to require participating states to fund medically necessary care falling within those categories. In particular, an HEW regulation precludes denial or reduction of payments, for

medically necessary services falling within any of the five mandatory categories, solely on the basis of "diagnosis, type of illness, or condition." 42 C.F.R. 440.230 (c) (1). The statute and regulation would be violated if a state were to single out medically necessary abortions for exclusion from coverage, because such action by a participating state would constitute a denial of payments based solely on diagnosis (*i.e.*, that an abortion is medically necessary) and condition (*i.e.*, pregnancy).

The statutory requirement that each state Medicaid plan "include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan" (42 U.S.C. 1396a(a) (17) (A)) does not authorize an otherwise prohibited exclusion of therapeutic abortions from coverage. That statutory provision does not override the provision requiring coverage of the mandatory service categories, and its legislative history shows that it was not intended to permit states to refuse payments on the basis of the kind of condition for which treatment is needed or the kind of medically necessary service within any of the five mandatory categories for which benefits are sought. Rather, the statutory reference to "reasonable standards" was designed to afford each participating state a degree of flexibility in determining the coverage of its plan with respect to persons for whom Medicaid assistance is optional, *i.e.*, the "medically needy" (see note 2, *supra*). In particular, a state enjoys considerable latitude under the statute in deciding which groups of persons should be eligible for assistance and what percentage of their income and resources must be expended for medical care before Medicaid benefits become available. See S. Rep. No. 404, *supra*, at 77, 79, 81; H.R. Rep. No. 213, *supra*, at 67, 69, 71.

Recognizing that the stated purpose of the Act is to provide "necessary medical services" (42 U.S.C. 1396), the Secretary has permitted states to place reasonable limits on the amount of coverage (*e.g.*, the number of days of inpatient hospital services) a state plan will provide and also to limit coverage on the basis of medical necessity (42 C.F.R. 440.230; *Beal v. Doe*, 432 U.S. 438 (1977)); neither the Medicaid Act nor the Secretary, however, has authorized participating states to eliminate coverage of a particular kind of medically necessary care.

II

THE COURT OF APPEALS CORRECTLY DECIDED THAT STATES PARTICIPATING IN THE MEDICAID PROGRAM ARE NOT REQUIRED BY THE MEDICAID ACT TO FUND MEDICALLY NECESSARY ABORTIONS FOR WHICH FEDERAL REIMBURSEMENT IS NOT AVAILABLE BECAUSE OF THE HYDE AMENDMENT

Appellees argued in the district court and the court of appeals that the Medicaid Act requires participating states to pay for medically necessary abortions, even if federal reimbursement for the cost of such services is not available. The court of appeals rejected that argument and remanded for consideration of appellees' constitutional challenge to Illinois' restrictive abortion funding policy. The court of appeals' decision is correct, and resolution of the constitutional questions presented on these appeals therefore cannot be avoided on statutory grounds.²⁴

The Medicaid program is a cooperatively funded endeavor of the federal and state governments. *Beal v. Doe*, 432 U.S. 438, 440 (1977); *cf. Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*,

²⁴ Appellees have filed a petition for a writ of certiorari (No. 79-64) in which they have argued that the court of appeals erred in holding that the Hyde Amendment eliminated whatever statutory obligation states participating in the Medicaid program may have had to fund medically necessary abortions for which federal reimbursement is now unavailable. Unlike the statutory question presented by appellants in No. 79-4 (see pages 38-44, *supra*), this issue is open to review on the present appeals because, if resolved in favor of appellees, it would provide an alternative ground supporting in part the judgment of the district court.

392 U.S. 309, 316 (1968). Financial contribution by both levels of government is the cornerstone of the entire program. The federal government agrees to appropriate funds to enable states to provide medical assistance to needy persons, and the states in turn agree to establish Medicaid plans that satisfy the requirements of the federal statute.²⁵ The Medicaid Act does not require the states to assume sole financial responsibility for any kind of medical service.²⁶ As a consequence, the court of appeals did not need

²⁵ The Medicaid Act provides that the federal government will pay a specified percentage of "the total amount expended * * * as medical assistance under the State plan * * *." 42 U.S.C. 1396b(a)(1). The statute then defines "medical assistance" as payment for health care (for eligible persons) falling within certain specified categories of services, including the mandatory categories. 42 U.S.C. 1396d(a).

²⁶ On a few specific occasions, Congress has conditioned a state's participation in the Medicaid program upon its willingness to maintain certain pre-existing state welfare benefits, even though those benefits would not qualify for federal reimbursement. See, e.g., Pub. L. No. 94-585, Section 2(a), 90 Stat. 2901-2902 (state supplementation of Supplemental Security Income benefits under Title XVI of the Social Security Act); Pub. L. No. 93-66, Section 212, 87 Stat. 155 (same); *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); *Oklahoma v. Harris*, Civ. No. 78-0475 (D.D.C. Oct. 31, 1979). But Congress has never conditioned a state's participation in the Medicaid program upon its willingness to assume *new* financial obligations in the absence of federal assistance. Moreover, as the court of appeals in the present case observed (J.S. App. 47a n.12), Congress has always used clear and explicit language whenever it has required unilateral state funding of certain social welfare benefits as a precondition for participation in the Medicaid program.

to view the Hyde Amendment as a substantive change in the Medicaid Act (see J.S. App. 44a-50a) in order to conclude that participating states are not obliged under the Act to fund abortions for which Congress has refused to provide federal payments.²⁷ The court's result could have been reached much more directly simply by following the principle that has always pervaded the operation of the Medicaid Act: states are not obliged by federal law to pay for services for which federal contribution is unavailable. See 42 U.S.C. 1396d(b) (specifying the federal medical assistance percentage for services funded under the Act; no suggestion that some services must be funded entirely by the states); S. Rep. No. 404, 89th Cong., 1st Sess. 83-85 (1965) (describing financing of medical assistance under Title XIX and indicating federal re-

²⁷ We do not mean to disavow in any way the court of appeals' thorough analysis of the congressional intent underlying the Hyde Amendment or the court's conclusion that the Amendment eliminated the obligation of participating states to fund medically necessary abortions. We intend to suggest only that variation in the required coverage of state Medicaid plans depending on changes in the availability of federal funds is a possibility built into the Medicaid Act itself, and for that reason it may be misleading to characterize the Hyde Amendment as "a substantive change in the law" (J.S. App. 47a n.13). It is perhaps more accurate to say that, in enacting the Hyde Amendment, Congress did not change the Medicaid Act but in fact relied on and used the existing statutory scheme to produce what it believed was a desirable result. The situation presented in this case is thus wholly different from that considered in *TVA v. Hill*, 437 U.S. 153, 189-193 (1978), in which the Court was invited to hold that "expenditures authorized under one Act [of Congress] should be interpreted to repeal the substantive provisions of an entirely independent Act" (J.S. App. 48a-49a).

imbursement would be provided for all legitimate state expenditures under an approved Medicaid plan); H.R. Rep. No. 213, 89th Cong., 1st Sess. 72-74 (1965) (same).

The correctness of this view of the federal statute can be demonstrated by considering a hypothetical appropriations measure not specifically addressed to abortion or any other single medical service. If Congress were to pass an HEW appropriations act that barred all federal payments for inpatient hospital services, surely participating states would not be required to maintain their current level of funding for hospital care (or to increase their total payments for such care) as a precondition to receiving federal reimbursement for the other kinds of medical services covered by the Medicaid Act. The Act does not contemplate the imposition of such substantial financial burdens as a price for obtaining federal funds. The statute is not a device whereby the federal government attempts to induce states to fund services that Congress itself is unwilling to support financially. Rather, Title XIX establishes a cooperative program under which the federal government offers to subsidize several comprehensive categories of medical services if the participating states agree to make medical assistance payments on an equally broad basis. If federal monies are not forthcoming for the full range of services included in the Medicaid categories, the states are not compelled nonetheless to undertake full funding responsibility for the abandoned services in order to obtain a share of whatever federal benefits are still available under the Act.

This reasoning comports fully with the legislative history of the Hyde Amendment recounted by the court of appeals in the present case (J.S. App. 45a-49a), the First Circuit in *Preterm, Inc. v. Dukakis*, *supra*, 591 F.2d at 128-131, and the Eighth Circuit in *Hodgson v. Board of County Commissioners*, *supra*, slip op. 18-24. As the court of appeals observed (J.S. App. 46a), the legislators who have debated the Hyde Amendment over the past four years have always assumed "that when federal funds [are] withdrawn, the states, although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, [will] refuse to do so." Moreover, no Member of Congress, whether proponent or opponent of the Hyde Amendment, has ever suggested that the restriction of federal appropriations for certain categories of abortions *requires* continued state funding of such medical services (*ibid.*). Such a suggestion would be inconsistent with the structure and history of the Medicaid program.

In sum, the Congresses that have enacted the Hyde Amendment in its various forms have consistently recognized that no amendments to the Medicaid Act itself are necessary to relieve participating states of the obligation to pay for medically necessary abortions that the federal government will no longer fund. The common understanding has been that, from its inception, the Act has never contemplated compelling states to fund medical services for which federal reimbursement is unavailable.

III

THE CHALLENGED ILLINOIS STATUTE AND THE HYDE AMENDMENT ARE CONSTITUTIONAL BECAUSE THE STATE LEGISLATURE AND CONGRESS HAD A RATIONAL BASIS FOR TREATING ABORTION DIFFERENTLY FROM OTHER MEDICALLY NECESSARY PROCEDURES

A. The Constitutional Question Presented in This Case Is Not Affected by the Recent Change in the Hyde Amendment

The district court's decision regarding the constitutionality of Illinois' restrictive abortion funding policy and the related provisions of the Hyde Amendment addressed statutory measures that have since been affected by congressional action. As previously explained (see page 9, *supra*), Congress has recently deleted the portion of the Hyde Amendment that would have permitted the expenditure of federal funds for abortions "in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term." The currently effective funding limitations, therefore, are even more restrictive than those considered in the judgment here on appeal.

This change in the Hyde Amendment, however, does not affect the constitutional question in this case. The district court's reasons for invalidating the approach reflected in the Hyde Amendment for fiscal year 1979 would apply equally to the version of the federal statute now in place. In its present form, as before, the Hyde Amendment (and the Illinois statutory scheme construed to follow it) denies funding

for some medically necessary abortions prior to fetal viability. This, the district court held, is impermissible, because the state's interest in preserving the life of a nonviable fetus cannot rationally outweigh its interest in safeguarding the prospective mother's health. The legal analysis employed as a basis for the district court's constitutional ruling would thus remain unchanged under the current statutory formula. Accordingly, this Court need not defer review in order to afford the district court an opportunity to evaluate the effects of the recent statutory revision.

B. Legislative Distinctions Between Abortion and Other Medical Procedures Should Be Reviewed Under the "Rational Basis" Test

As the district court recognized (J.S. App. 12a-13a), an equal protection challenge to the restrictions on the use of public monies contained in the Hyde Amendment and the Illinois abortion funding statute must be resolved under the so-called "rational basis" test. Questions concerning the propriety of limiting public assistance to indigent persons for certain medical services do not involve any "fundamental rights" or "suspect classifications" of the kind that warrant stricter judicial scrutiny of legislative distinctions. Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *McLaughlin v. Florida*, 379 U.S. 184 (1964). As this Court said in *Maher v. Roe*, 432 U.S. 464, 469 (1977), "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." See also *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

The question of compulsory public funding for abortions is thus different from the question whether a state may choose to prohibit abortions altogether. The Court has held that a woman has a fundamental privacy right to decide whether or not to terminate a pregnancy and that, prior to fetal viability, a state's interest in the potential life of the fetus is not sufficiently compelling to justify direct restrictions on the prospective mother's freedom to make that decision. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979). But the matter at issue is not whether Illinois may limit a pregnant woman's freedom of choice; the question is only whether the State must provide her with financial assistance, regardless of the nature of her decision.

The difficulty that members of the appellee class of pregnant women may encounter in obtaining abortions is a consequence solely of their indigency, not of governmental restrictions on the circumstances in which such medical services may legally be performed. See *Maier v. Roe, supra*, 432 U.S. at 474; J.S. App. 11a. Neither Illinois nor the federal government has sought to regulate appellees' behavior directly; they have merely refused to pay for one of several equally permissible options. The state and federal statutes, in short, do not limit the situations in which women may obtain or physicians may perform abortions; they do not penalize women who terminate their pregnancies or physicians who help them do so; they

merely describe the conditions under which public funds will be available to finance the abortion procedure. This distinction is an important one. In the Court's words (*Maier v. Roe, supra*, 432 U.S. at 475-476) (footnote omitted),

[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Maier v. Roe, supra, and *Poelker v. Doe, supra*, establish that abortion funding limitations are to be judged in accordance with the "rational basis" test. They must be sustained if the distinction they make between abortion and other medical procedures "rationally furthers some legitimate, articulated [government] purpose * * *." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973), quoted in *Maier v. Roe, supra*, 432 U.S. at 470. Put another way, statutes like the Illinois law at issue here must be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). See also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 314 (1976).

Nothing in this Court's decisions suggests that a different constitutional standard should apply when Congress or a state legislature has drawn a distinction within the category of medically necessary services rather than between one or more "elective" procedures (*e.g.*, nontherapeutic abortions), on the one hand, and medically necessary services generally, on the other. The point remains that public funding for medical treatment—whether that treatment is necessary for health reasons or only "elective"—is not a matter of constitutional entitlement. Statutory classifications among medical services do not involve any constitutionally protected "fundamental rights" or any invidious discrimination on the basis of constitutionally impermissible factors. Legislatures therefore may make whatever such classifications they deem desirable, as long as the classifications are rationally related to some legitimate government interest.

This Court's decision in *Roe v. Wade*, *supra*, did not address itself to the states' obligation to assist their citizens in obtaining needed medical care; at least for abortions undertaken before fetal viability, the privacy right recognized in *Wade* did not turn to any extent on whether a woman's decision to terminate her pregnancy was a product of medical necessity or other factors. By the same token, the appropriate standard of equal protection review outlined in *Maher* does not depend on whether a state's funding classifications are based on comparative judgments about the medical justification for different procedures or on an evaluation of separate

factors not necessarily related to the preservation of a patient's health. In either event, the critical consideration is whether the legislature has acted rationally in distinguishing among prospective recipients of public funds for medical care.

C. Legislative Decisions to Pay for Abortions Only When the Life of the Mother Would Be Endangered by Carrying the Pregnancy to Term Are Rationally Related to Legitimate Government Interests

The Illinois abortion funding statute and the Hyde Amendment (in each of its versions) satisfy the "rational basis" test, because they advance two legitimate legislative concerns: the desire to encourage normal childbirth and to protect the potentiality of human life, and the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. The legislative history of the federal and state provisions demonstrates that these were the concerns that motivated Congress and the Illinois General Assembly to limit the availability of public funds for abortions.

For example, Representative Hyde, the sponsor of the original version of the federal appropriations amendment, stated that the measure was intended "to protect that most defenseless and innocent of human lives, the unborn * * *." 122 Cong. Rec. 20410 (1976). See also *id.* at 27676 (remarks of Sen. Stennis). Senator Buckley, a leading supporter of the amendment, declared that Congress should not permit the expenditure of federal funds for a "procedure that appalls the conscience of a very substantial per-

centage of the American taxpayers." *Id.* at 27675. See also *id.* at 27673 (remarks of Sen. Helms) ("there are millions of Americans * * * who are opposed to the use of their tax dollars to promote [abortion]"); *id.* at 27679 (remarks of Sen. Bartlett) ("I just do not think * * * we should feel we have a right or an obligation to finance abortions, which are simply considered anathema by many, many people in this country"). Similar remarks may be found in the legislative record for virtually every occasion on which Congress has considered the Hyde Amendment in one or another of its forms. See, e.g., 124 Cong. Rec. S16317-S16318 (daily ed. Sept. 27, 1978) (remarks of Sen. Hatch); 124 Cong. Rec. H12516 (daily ed. Oct. 12, 1978) (remarks of Rep. Hyde); 123 Cong. Rec. S18589 (daily ed. Nov. 3, 1977) (remarks of Sen. Helms and Sen. Bartlett); 123 Cong. Rec. H12489-H12490 (daily ed. Nov. 29, 1977) (remarks of Rep. Bauman).²⁸ Likewise, excerpts from the General Assembly debates on the Illinois statute, reprinted in the Appendix in this Court (A. 42-88), leave no doubt that the proponents of the challenged legislation intended to encourage childbirth and to prevent the use of tax revenues for

²⁸ Reliance on congressional floor debates for statements concerning the purpose of the Hyde Amendment is necessary because the conference reports and the House and Senate appropriations committee reports on HEW appropriations measures generally have not discussed abortion funding limitations other than to note their inclusion in the pending bill. See, e.g., H.R. Conf. Rep. No. 96-646, 96th Cong., 1st Sess. (1979); H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. (1979).

a purpose that they and a significant portion of their constituents found morally objectionable.

This Court has repeatedly held, and the district court in the present case recognized, that the federal and state governments have an "important and legitimate interest in protecting the potentiality of human life." *Roe v. Wade*, *supra*, 410 U.S. at 162; *Beal v. Doe*, *supra*, 432 U.S. at 445-446; J.S. App. 15a. Although this interest is not sufficiently compelling prior to fetal viability to justify direct government regulation or prohibition of abortion, "it is a significant state interest existing throughout the course of the woman's pregnancy." *Beal v. Doe*, *supra*, 432 U.S. at 446. In *Maher v. Roe*, *supra*, 432 U.S. at 478, for example, the Court concluded that a state's strong and important interest in encouraging normal childbirth provides a rational basis for a legislative or administrative decision to subsidize costs incident to childbirth but not those associated with nontherapeutic abortions. See also *Poelker v. Doe*, *supra*, 432 U.S. at 520-521 (sustaining a mayor's policy directive prohibiting the performance of abortions in city hospitals except in cases involving "a threat of grave physiological injury or death to the mother"); *D—R— v. Mitchell*, *supra*, 456 F. Supp. at 615 ("Given the state's strong interests in protecting the potential life of the fetus, encouraging normal childbirth and appropriately using state funds * * *, the life-endangering standard of [the Utah statute] is entirely reasonable"), *Woe v. Califano*, *supra*; *Doe v. Mundy*, *supra*.

Congress and the Illinois General Assembly have chosen a rational means of furthering their legitimate interest in normal childbirth and discouraging resort to abortion except in the most urgent circumstances. By agreeing to pay the medical expenses of indigent women who carry their pregnancies to term but refusing to pay the comparable expenses of women who undergo abortions (unless their lives are threatened by a continuation of pregnancy or they are the victims of rape or incest), the federal and state governments have created incentives that make childbirth "a more attractive alternative" for persons eligible for publicly-funded medical assistance. See *Maier v. Roe, supra*, 432 U.S. at 474.²⁹

The district court held, however, that a legislature, in making its funding decisions, cannot rationally choose to prefer the potential life of a nonviable fetus

²⁹ Congress has attempted to encourage childbirth by building similar incentives into other federally-sponsored health programs. See Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Section 608, 92 Stat. 3601; Pub. L. No. 95-555, 92 Stat. 2076; Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, Title III, 92 Stat. 1597; Department of Defense Appropriations Act, 1979, Pub. L. No. 95-457, Section 863, 92 Stat. 1254; Civil Rights Commission Act of 1978, Pub. L. No. 95-444, Section 3(a), 92 Stat. 1067; International Development and Food Assistance Act of 1978, Pub. L. No. 95-424, Section 104(a), 92 Stat. 946; Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, Section 10, 91 Stat. 1622; Pub. L. No. 95-215, Section 7, 91 Stat. 1507. Thus, the legislative policy of promoting childbirth and discouraging abortion has not been applied only to persons sufficiently needy to be eligible for Medicaid assistance.

over the immediate health needs of a pregnant woman. J.S. App. 15a, 18a. The only justification that the court offered for this view was the assertion that application of the challenged statutory criteria for Medicaid funding of abortions will "increase substantially maternal morbidity and mortality among indigent pregnant women" (*id.* at 17a).³⁰ This statement merely reflects the undisputed fact that there are competing values at stake in the process of legis-

³⁰ To some extent at least, the district court's dire predictions concerning the likely practical effect of the Illinois statute and the Hyde Amendment may be based on a misimpression regarding the way in which the statutory criteria will be applied. Appellees' complaint (A. 14) simply defined "medically necessary" abortions as "therapeutic abortions for which [the Illinois law] denies reimbursement * * *." The court of appeals agreed that this set of abortions is not empty, but it acknowledged that the size of the set could vary greatly depending on the way in which the phrase "necessary for the preservation of the life of the woman" is interpreted (J.S. App. 80a-85a). The same observation is appropriate with respect to the Hyde Amendment's exception for cases in which "the life of the mother would be endangered if the fetus were carried to term." The parties did not litigate in the courts below the proper application of the relevant statutory language to one or more particular abortions that a plaintiff woman sought to obtain or a plaintiff doctor sought to perform. Although a definitive statutory construction must await further developments, it is at least possible that public funding would be available under the Illinois statute and the Hyde Amendment if a doctor were to certify that continued pregnancy could lead to complications that would threaten the mother's life. If so, the district court's fears might be alleviated to some degree. In any event, it is unwarranted to assume at the present time that a pregnant woman must actually be near death before she can receive Medicaid funds for an abortion.

lative decisionmaking on the availability of Medicaid funds for abortions.

Based on its assessment of the weight that ought to be attached to the protection of a pregnant woman's health, a legislature or a court might well conclude, as a policy matter, that public financial assistance should be made available for all medically necessary abortions sought by indigent women, or at least for all such abortions prior to fetal viability. But that does not mean that any other policy choice is irrational. By contrast to the district court, Congress and the Illinois General Assembly have chosen to assign greater relative weight to the value of encouraging childbirth and preserving potential human life. For this reason, the federal and state governments have made public funds available, not for all medically necessary abortions, but only in circumstances where a continued pregnancy would threaten the woman's life (or where the pregnant woman is a victim of rape or incest).

One may quarrel with this policy choice, and a reviewing court might even conclude that Congress and the state legislature have acted unwisely. But such a conclusion would not imply that the Hyde Amendment and the challenged state statute lack any rational basis. See *Maher v. Roe, supra*, 432 U.S. at 479-480. Courts may not invalidate duly enacted statutes merely "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), quoted in *Dandridge*

v. *Williams, supra*, 397 U.S. at 484. On the contrary, as this Court admonished in *Maher* (432 U.S. at 479), "when an issue involves policy choices as sensitive as those implicated [here] * * *, the appropriate forum for their resolution in a democracy is the legislature."³¹

³¹ Like the Illinois statute at issue here, a Missouri state regulation limiting the availability of Medicaid funds for abortions has recently been construed to require payment for all abortions for which federal funds will be provided under the Hyde Amendment. *Reproductive Health Services v. Freeman, supra*, slip op. 6-12. In the same case, the Eighth Circuit held that the Missouri regulation, as so construed, is "irrationally underinclusive in that it generally denies subsidies to indigent women seeking medically necessary abortions but extends subsidies for medically necessary abortions to those indigent women whose pregnancies have resulted from rape or incest." *Id.* at 22. The court of appeals reasoned that "[i]n terms of either protecting fetal life or preserving the patient's health, there is no rational distinction between the woman who wants a medically necessary abortion because of rape or incest and the woman who wants such an abortion simply because she needs it to preserve her health." *Ibid.*

The Eighth Circuit's ruling suffers from the same fundamental defect that characterizes the district court's decision in the present case. Under the guise of applying the "rational basis" test, the court of appeals has substituted its judgment for that of the state officials responsible for administering Missouri's Medicaid program. A legislature or state administrator could rationally conclude that the state interest in fetal life is ordinarily sufficient to outweigh the interest in preserving maternal health but that the interest in fetal life is overborne when the interest in maternal health is combined with the additional interest in helping the victims of rape or incest avoid the need to bear a child conceived as a result of such traumatic events. The court of appeals simply refused to acknowledge the latter interest; indeed, the court failed to recognize any distinction at all between pregnancies resulting from rape or incest and other pregnancies.

By virtue of its strong and legitimate interest in encouraging childbirth, Congress or a state legislature could rationally choose not to fund any abortions. Neither Congress nor the Illinois General Assembly has gone that far. Both bodies have simply described more narrowly than appellees and the district court would like the situations in which other interests outweigh the interest in protecting potential human life and thus justify the expenditure of public funds for abortions. Statutes embodying that policy judgment are not vulnerable to constitutional attack on the ground that similar restrictions have not been imposed on other medically necessary procedures funded under the Medicaid Act.³² Abortion is dif-

³² In fact, abortion is not the only "medically necessary" service for which federal Medicaid funds are sometimes unavailable to otherwise eligible claimants. Title XIX provides that, for patients between the ages of 21 and 65, inpatient hospital care in institutions for tuberculosis or mental disease is not covered under the Act. 42 U.S.C. 1396d(a)(17)(B). At the same time, the statute does include coverage for outpatient psychiatric or tuberculosis care or in-patient psychiatric or tuberculosis care in a general hospital. Like the Hyde Amendment restrictions on the availability of federal funds for abortions, these statutory provisions permit payments for one kind of medical treatment for a given condition, but not for another kind of treatment for the same condition. The constitutionality of the Medicaid provision dealing with the availability of funds for psychiatric services has been sustained in *Kantrowitz v. Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976), and *Legion v. Richardson*, 354 F. Supp. 456 (S.D.N.Y.), aff'd, 414 U.S. 1058 (1973).

Appellees have attempted (Motion to Vacate 19 n.*) to deny the relevance of *Kantrowitz* and *Legion* to the present

ferent from other medical procedures because no other procedure involves "the termination of a potential human life." *Maher v. Roe*, *supra*, 432 U.S. at 480.

This Court has acknowledged that "not all distinction between abortion and other [medical] procedures is forbidden." *Bellotti v. Baird*, 428 U.S. 132, 149-150 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52, 66-67, 80-81 (1976); *Bellotti v. Baird*, No. 78-329 (July 2, 1979) (plurality opinion), slip op. 25-26. A legislature could legitimately decide, on the basis of its interest in protecting potential human life, to limit the availability of public funds for abortions but not for other medically necessary procedures. The constitutionality of such a limitation does not depend on whether an abortion is sought before or after the fetus is viable. In either event, the special characteristics of an abortion provide a rational basis for the imposition of funding restrictions not applicable to other medical services. The district court therefore erred in holding that the Hyde Amendment and the Illinois statute are "unconstitutional as applied to medically necessary

case by observing that the care and treatment there involved were of a kind historically provided by state agencies. But the cases are not cited here for the proposition that the reasons for excluding some forms of psychiatric or tuberculosis care from the coverage of the Medicaid Act are the same as those for excluding some medically necessary abortions. The point is that, in structuring the federal medical assistance program, Congress may make distinctions between one form of medically necessary care and another, as long as it has a rational basis for doing so.

abortions prior to the point of fetal viability" (J.S. App. 21a).

CONCLUSION

The judgment of the district court should be vacated to the extent it declares the Hyde Amendment unconstitutional. The judgment should be reversed to the extent it declares the Illinois abortion funding statute unconstitutional and grants relief against appellant in No. 79-5.

Respectfully submitted.

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JANUARY 1980

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

No person shall * * * deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the Constitution provides in pertinent part:

No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 109 of the Joint Resolution making further continuing appropriations for the fiscal year 1980, and for other purposes, Pub. L. No. 96-123, 93 Stat. 926, provides in pertinent part:

Notwithstanding any other provision of this joint resolution except section 102, none of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service * * *.

Section 210 of the Act Making Appropriations for the Departments of Labor and Health, Education,

and Welfare, and Related Agencies for the fiscal year ending September 30, 1979, and for other purposes, Pub. L. No. 95-480, 92 Stat. 1586, provides in pertinent part:

None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Chapter 23 of the Illinois Annotated Statutes (Smith-Hurd 1979 Supp.) provides in pertinent part:

Sec. 5-5. Medical services. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing home services; (5) physicians' services whether furnished in the office, the patient's home, a hospital, a skilled nursing home, or elsewhere; (6) medical care, or any other type of remedial care furnished by licensed practitioners; (7) home health care services; (8) private duty nursing service; (9) clinic services; (10) dental services; (11) physical therapy and re-

lated services; (12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in the diseases of the eye, or by an optometrist, whichever the person may select; (13) other diagnostic, screening, preventive, and rehabilitative services; (14) transportation and such other expenses as may be necessary; (15) medical treatment of rape victims for injuries sustained as a result of the rape, including examinations and laboratory tests to discover evidence which may be used in criminal proceedings arising from the rape; (16) any other medical care, and any other type of remedial care recognized under the laws of this State, but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child. The preceding terms include nursing care and nursing home service for persons who rely on treatment by spiritual means alone through prayer for healing.

* * * * *

The rules and regulations of the Illinois Department shall require that a written statement including the required opinion of a physician shall accompany any claim for reimbursement for abortions, or induced miscarriages or premature births. This statement shall indicate what procedures were used in providing such medical services.

* * * * *

Sec. 6-1. Eligibility requirements. Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions of Sections 6-1.1 through 6-1.6. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

* * * * *

Sec. 7-1. Eligibility requirements. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Sections 7-1.1 through 7-1.3, except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

MAR 1 1980

ROBERT W. BENNETT, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D.,

Appellants,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-5

JEFFREY MILLER, Acting Director, Illinois Department of Public Aid,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-491

UNITED STATES OF AMERICA,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

On Appeals from the United States District Court for the Northern District of Illinois

BRIEF OF APPELLEES

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	3
STATEMENT	4
SUMMARY OF ARGUMENT	20
ARGUMENT:	
I.	
This Court Has Appellate Jurisdiction Over the Present Appeals Under 28 U.S.C. §1252 But Lacks Jurisdiction to Resolve the Constitutionality of the Hyde Amendment	28
A. There Is No Case or Controversy as to the Constitutionality of the Hyde Amendment	28
B. This Court Has Jurisdiction to Review the Remainder of the District Court's Judgment, and It Should Do So	30
II.	
This Court Lacks Appellate Jurisdiction to Re- view the Appeals of Illinois and the Intervenors on Statutory Issues, But Should Review Statutory Claims Which Provide Alternative Grounds for Affirming the District Court Judgment	33
III.	
Illinois' Discrimination Against Women Requiring Medically Necessary Abortions Deprives Those Women of Rights Under the Fourteenth Amend- ment	38

- A. Illinois' Discrimination Against Women Requiring Medically Necessary Abortions Must Be Subjected to the Compelling State Interest Test 41
- B. Illinois' Discrimination Against Indigent Women Requiring Medically Necessary Abortions Is Not Rationally Related to Any Legitimate State Interest, Let Alone Justified by Any Compelling One 50

IV.

The Social Security Act Requires Illinois to Cover Medically Necessary Abortion Services for Eligible Pregnant Women; This Requirement Is Unaffected by the Hyde Amendment 71

- A. Introduction 71
- B. Title XIX Requires Participating States to Cover Medically Necessary Abortion Services 73
- C. The Hyde Amendment Does Not Impliedly Relieve Illinois of Its Duty Under the Social Security Act to Cover All Medically Necessary Abortion Services 99

V.

The Hyde Amendment, If Construed to Relieve Illinois of Its Statutory Obligation to Cease Discriminating Against Women Requiring Medically Necessary Abortions, and If Its Constitutionality Is Presented in These Appeals, Deprives Plaintiffs of Their Rights Under the Fifth Amendment 130

CONCLUSION 132

APPENDIX:

- A—Illinois Medical Assistance Program Rules 1a
- B—Federal Statutes 4a
- C—Federal Regulations 24a

CITATIONS

Cases

- American Medical Association v. Weinberger*, 395 F. Supp. 515 (N.D. Ill. 1975) 97n.
- Ashwander v. TVA*, 297 U.S. 288 (1935) 102n.
- Association of American Physicians and Surgeons v. Weinberger*, 395 F.Supp. 125 (N.D. Ill. 1975) 91
- Barr v. United States*, 324 U.S. 83 (1945) 94
- Beal v. Doe*, 432 U.S. 438 (1977) 23, 25, 38n., 44n., 56, 65, 71, 81n., 91, 93, 96, 99
- Bellotti v. Baird*, 428 U.S. 132 (1976) 46
- Bolling v. Sharpe*, 347 U.S. 497 (1954) 131
- Buckley v. Valeo*, 424 U.S. 1 (1976) 50
- Bullock v. Carter*, 405 U.S. 134 (1972) 47n.
- Califano v. Goldfarb*, 430 U.S. 199 (1977) 53, 59
- Califano v. Webster*, 430 U.S. 313 (1977) 53
- Carey v. Population Services International*, 431 U.S. 678 (1977) 41n., 59, 68
- Catlin v. United States*, 324 U.S. 229 (1945) 22, 37
- Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) 42
- Cobbledick v. United States*, 309 U.S. 323 (1940) 37
- Colautti v. Franklin*, 439 U.S. 379 (1979) 22, 38n., 40, 42, 54, 55, 67
- Corey v. United States*, 375 U.S. 169 (1963) 37
- Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) 37
- Craig v. Boren*, 429 U.S. 190 (1976) 41n.
- Curtis v. Page*, [1979 Transfer Binder] MEDICARE & MEDICAID GUIDE (CCH) ¶29,649 (N.D. Fla. 1979) 98n.
- D.C. Federation of Civic Associations, Inc. v. Airis*, 391 F.2d 478 (D.C. Cir. 1968) 101n.
- D. R. v. Mitchell*, No. 78-1675 (10th Cir. Oct. 25, 1979) 99n.
- D. R. v. Mitchell*, 456 F.Supp. 609 (D. Utah 1978) 99
- Dandridge v. Williams*, 397 U.S. 471 (1970) 24, 60, 61, 78, 124n.

<i>District of Columbia Podiatry Society v. District of Columbia</i> , 407 F.Supp. 1259 (D.D.C. 1975)	98
<i>Dodson v. Parham</i> , 427 F.Supp. 97 (N.D. Ga. 1977)	98
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	20, 23, 25, 38n., 40, 55, 65, 66, 69, 91, 96n., 97
<i>Doe v. Busbee</i> , 471 F.Supp. 1326 (N.D. Ga. 1979)	97, 126n.
<i>Doe v. Kenley</i> , 584 F.2d 1362 (4th Cir. 1978)	98
<i>Doe v. Mathews</i> , 422 F.Supp. 141 (D.D.C. 1976)	102n.
<i>Doe v. Percy</i> , 476 F.Supp. 324 (W.D. Wis. 1979)	41, 45n.
<i>Doe v. Poelker</i> , 515 F.2d 541 (8th Cir. 1975)	45n.
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	49
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	42, 53
<i>Emma G. v. Edwards</i> , Civ. No. 77-1342-B (E.D. La. 1978)	98
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	23, 59
<i>Eskra v. Morton</i> , 524 F.2d 9 (7th Cir. 1975)	59n.
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	48n., 58
<i>Farmers & Mechanics National Bank v. Wilkinson</i> , 266 U.S. 503 (1925)	34n.
<i>FHA v. Darlington</i> , 352 U.S. 977 (1957)	31n.
<i>Geduldig v. Aiello</i> , 417 U.S. 484 (1974)	54n., 58
<i>Gemsco v. Walling</i> , 324 U.S. 244 (1944)	107
<i>Gibney v. United States</i> , 114 Ct. Cl. 38 (1949)	118
<i>Greater New York Hospital Association v. Blum</i> , 476 F.Supp. 234 (E.D. N.Y. 1979)	85n.
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	48n., 58
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	41, 54n.
<i>Harris v. McRae</i> , No. 79-1268 (U.S. S.Ct. Feb. 19, 1980)	21, 33
<i>Hodgson v. Board of County Commissioners</i> , [1980] 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,159 (8th Cir. Jan. 9, 1980)	14, 60n., 98, 101n., 127n.
<i>Hudson Distributors, Inc. v. Lilly & Co.</i> , 377 U.S. 386 (1964)	37
<i>Huron Holding Co. v. Lincoln Mine Operating Co.</i> , 312 U.S. 183 (1941)	36
<i>Illinois Welfare Rights Organization v. Trainor</i> , 438 F. Supp. 269 (N.D. Ill. 1977)	18n.
<i>Jefferson v. Hackney</i> , 406 U.S. 535 (1972)	77

<i>Jewell Ridge Coal Corp. v. Local 6167, UMW</i> , 325 U.S. 161 (1945)	115, 117n.
<i>King v. Smith</i> , 392 U.S. 309 (1968)	78
<i>Lewis v. Shulimson</i> , 400 F.Supp. 807 (E.D. Mo. 1975) ..	127n.
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	59
<i>Maher v. Roe</i> , 432 U.S. 464 (1977)	22, <i>passim</i>
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	22, 37
<i>McLucas v. DeChamplain</i> , 421 U.S. 21 (1975)	20, 30, 31
<i>McRae v. Mathews</i> , 421 F.Supp. 533 (E.D. N.Y. 1976)	122
<i>McRae v. Secretary of HEW</i> , 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 (E.D. N.Y. Jan. 15, 1980)	9n., 12-16, 18, 20, 32, 41, 49, 57, 60n., 63n., 65, 98, 115
<i>Memorial Hospital v. Maricopa County</i> , 415 U.S. 250 (1974)	23, 46, 47, 48, 49
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	49, 50
<i>Moore v. Charlotte-Mecklenburg Board of Education</i> , 402 U.S. 47 (1971)	30
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977) ..	42, 47n
<i>Muskrat v. United States</i> , 219 U.S. 346 (1911)	20, 29
<i>National Nutritional Foods Association v. FDA</i> , 504 F. 2d 761 (2d. Cir. 1974)	115
<i>NLRB v. Thompson Products, Inc.</i> , 141 F.2d 794 (9th Cir. 1944)	118
<i>New York Airways v. United States</i> , 369 F.2d 743 (Ct. Cl. 1966)	118
<i>Palmer v. United States</i> , 411 U.S. 389 (1973)	36
<i>Phillips Chemical Co. v. Dumas Independent School District</i> , 361 U.S. 376 (1960)	34n.
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	49, 50
<i>Planned Parenthood Affiliates of Ohio v. Rhodes</i> , 477 F.Supp. 529 (S.D. Ohio 1979)	98, 106, 126n., 129
<i>Planned Parenthood of Central Missouri v. Danforth</i> , 428 U.S. 52 (1976)	24, 40, 53, 54n., 55, 66, 67
<i>Poelker v. Doe</i> , 432 U.S. 519 (1977)	39, 45n., 69
<i>Preterm, Inc. v. Dukakis</i> , 591 F.2d 121 (1st Cir. 1979) ..	98, 127n.
<i>Regional Rail Reorganization Act Cases</i> , 419 U.S. 102 (1975)	121n., 129

<i>Reproductive Health Services v. Freeman</i> , 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 (8th Cir. Jan. 9, 1980)	41, 45n., 56n., 58, 60n., 62, 65, 98
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	56
<i>Reitman v. Mulkey</i> , 387 U.S. 369 (1967)	53
<i>Reser v. Califano</i> , 467 F.Supp. 446 (W.D. Mo. 1979) ..	128n.
<i>Right to Choose v. Byrne</i> , 398 A.2d 587 (N.J. Super. 1979)	19n., 97
<i>Roe v. Casey</i> , 464 F.Supp. 847 (E.D. Pa. 1978)	97
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	22, 39, 40, 42, 50, 52, 53, 54, 55, 59, 65, 68, 69, 96
<i>Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920)	56
<i>Rush v. Parham</i> , 440 F.Supp. 383 (N.D. Ga. 1977)	97n.
<i>S & E Contractors v. United States</i> , 406 U.S. 1 (1972) ..	106
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	40, 42, 43, 54n., 70
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	23, 43-44, 47-48, 49, 62, 131
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	54n.
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976)	49, 66
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942)	41
<i>Slaker v. O'Conner</i> , 278 U.S. 188 (1929)	37
<i>Smith v. Ginsberg</i> , Civ. No. 75-0380 CH (S.D. W.Va. May 9, 1978)	98
<i>Smith v. Vowell</i> , 379 F.Supp. 139 (W.D. Tex. 1974)	97n.
<i>Smolowe v. Delendo Corp.</i> , 36 F.Supp. 790 (S.D.N.Y. 1940)	36n.
<i>South Carolina Electric & Gas Co. v. Flemming</i> , 351 U.S. 901 (1956)	37
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	50n.
<i>Stanton v. Bond</i> , 504 F.2d 1246 (7th Cir. 1974)	79
<i>T. H. v. Jones</i> , 425 F.Supp. 873 (D. Utah 1975)	97n.
<i>Townsend v. Swank</i> , 404 U.S. 282 (1971)	131
<i>Trimble v. Gordon</i> , 430 U.S. 762 (1977)	53
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	26, 102-04, 114, 118, 121-22
<i>United States v. American Trucking Associations, Inc.</i> , 310 U.S. 543 (1939)	101

<i>United States v. Langston</i> , 118 U.S. 389 (1886)	102, 118, 119
<i>United States v. Raines</i> , 362 U.S. 17 (1960)	31n.
<i>United States v. Vuitch</i> , 402 U.S. 62 (1971)	91
<i>United States v. Vulte</i> , 233 U.S. 509 (1974)	119
<i>United States Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973)	23, 53, 59
<i>United States Department of Agriculture v. Murry</i> , 413 U.S. 508 (1973)	62
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977)	53
<i>Virginia Hospital Association v. Kenley</i> , 427 F.Supp. 781 (E.D. Va. 1977)	89
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)	28, 53, 131
<i>Westcott v. Califano</i> , 99 S.Ct. 2655 (1979)	59, 131
<i>White v. Beal</i> , 555 F.2d 1146 (3d Cir. 1977)	98n.
<i>Williams v. Zbaraz</i> , 99 S.Ct. 2095 (1979)	48-49, 54, 55, 60n.
<i>Women's Health Services, Inc. v. Maher</i> , Civ. No. H-79-405 (D. Conn. Jan. 7, 1980)	14, 16, 19, 20, 41, 56, 58, 60n., 68, 91, 98
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978)	40n., 42, 53

Constitution and Statutes

U.S. Const. art. III, § 2	20, 30
U.S. Const. amend. V	131
U.S. Const. amend. XIV, § 1	20, <i>passim</i>
7 U.S.C. § 2019 (d)	128n.
28 U.S.C. § 1252	20, 30, 31, 32, 33, 34n.
28 U.S.C. § 1254(2)	37
28 U.S.C. § 1291	32n.
28 U.S.C. § 2101	33
28 U.S.C. § 2403	36n.
42 U.S.C. § 306	75
42 U.S.C. § 306(b)	75
42 U.S.C. § 601	71, 78n.
42 U.S.C. § 602(a)(10)	125
42 U.S.C. § 603	124
42 U.S.C. § 603(d)	125

42 U.S.C. § 606(b)	75
42 U.S.C. § 607(b)(2)(A)	128
42 U.S.C. § 607(c)(B)	128
42 U.S.C. § 608	128n.
42 U.S.C. § 654(6)	127
42 U.S.C. § 655(a)	127
42 U.S.C. § 1206	75n.
42 U.S.C. § 1320c <i>et seq.</i>	25, 81, 91n.
42 U.S.C. § 1320c-2	83
42 U.S.C. § 1320c-4(a)(1)	82
42 U.S.C. § 1320c-5(a)	83, 92
42 U.S.C. § 1320c-5(b)	67, 83, 93
42 U.S.C. § 1320c-5(c)(1)	83
42 U.S.C. § 1320c-5(c)(2)	83
42 U.S.C. § 1320c-7	126
42 U.S.C. § 1320c-7(c)	85
42 U.S.C. § 1320c-9(a)(1)	83
42 U.S.C. § 1320c-13	81, 126
42 U.S.C. § 1320c-20(d)(3)(A)	85, 92
42 U.S.C. § 1355	75n.
42 U.S.C. § 1381	78n.
42 U.S.C. § 1385	75n.
42 U.S.C. § 1385(b)	75n.
42 U.S.C. § 1395-1395pp	90n., 125
42 U.S.C. § 1395d	90n.
42 U.S.C. § 1395v(a)	126
42 U.S.C. § 1395v(b)	126
42 U.S.C. § 1395v(h)	126
42 U.S.C. § 1395x(r)	95
42 U.S.C. § 1395y(a)	90n.
42 U.S.C. § 1396	30, 77, 79n., 84
42 U.S.C. § 1396a	123
42 U.S.C. § 1396a(a)(2)	90
42 U.S.C. § 1396a(a)(4)	86
42 U.S.C. § 1396a(a)(10)	86
42 U.S.C. § 1396a(a)(10)(A)	71
42 U.S.C. § 1396a(a)(10)(B)	98
42 U.S.C. § 1396a(a)(10)(C)	71, 75, 98
42 U.S.C. § 1396a(a)(13)	25, 86

42 U.S.C. § 1396a(a)(13)(A)	74n.
42 U.S.C. § 1396a(a)(13)(B)	72, 73, 74
42 U.S.C. § 1396a(a)(13)(C)	72
42 U.S.C. § 1396a(a)(17)	76, 77, 86, 98
42 U.S.C. § 1396a(a)(19)	25, 76, 86, 98
42 U.S.C. § 1396a(a)(20)	91n.
42 U.S.C. § 1396a(a)(22)(D)	25, 76, 86, 94
42 U.S.C. § 1396a(a)(26)	83n., 91n.
42 U.S.C. § 1396a(a)(30)	83n.
42 U.S.C. § 1396a(a)(31)	83n.
42 U.S.C. § 1396a(f)	127n.
42 U.S.C. § 1396b	123
42 U.S.C. § 1396b(a)(5)	124
42 U.S.C. § 1396b(a)(6)	124
42 U.S.C. § 1396b(b)(1)	126
42 U.S.C. § 1396b(e)	79, 80
42 U.S.C. § 1396b(g)	124
42 U.S.C. § 1396b(o)	127n.
42 U.S.C. § 1396b(p)(1)	123n.
42 U.S.C. § 1396d(a)	25, 72, 74, 75
42 U.S.C. § 1396d(a)(1)-(5)	72, 73
42 U.S.C. § 1396d(a)(4)	84n.
42 U.S.C. § 1396d(a)(4)(B)	79
42 U.S.C. § 1396d(a)(5)	95
42 U.S.C. § 1396d(a)(6)-(16)	72, 83
42 U.S.C. § 1396d(a)(16)	48n.
42 U.S.C. § 1396d(h)(1)(B)	91n.
Act of July 9, 1969, Pub. L. No. 91-41, § 3, 83 Stat. 44	125
Act of Aug. 9, 1969, Pub. L. No. 91-56, § 2, 83 Stat. 99	80
Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1410	25, 80
Act of Dec. 28, 1973, Pub. L. No. 93-233, 87 Stat. 947	96n.
Act of Dec. 31, 1975, Pub. L. No. 94-182, 89 Stat. 1051	96n.
Act of Oct. 8, 1976, Pub. L. No. 94-460, 90 Stat. 1956	96n.
Act of Oct. 18, 1976, Pub. L. No. 94-552, 90 Stat. 2540	96n.
Adolescent Pregnancy Prevention and Care Act, Pub. L. No. 95-626, § 601(a)(3), 92 Stat. 3551 (1978)	66
Joint Resolution on Appropriations, 1980, Pub. L. No. 96-123, § 109, 93 Stat. 925 (1979)	101n., <i>passim</i>

Labor-HEW Appropriations Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976)	109, <i>passim</i>
Labor-HEW Appropriations Act, 1978, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977)	105, <i>passim</i>
Labor-HEW Appropriations Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978)	109, <i>passim</i>
Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Pub. L. No. 95-142, 91 Stat. 1175	61n.
Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 987 ("Kerr-Mills")	73n., 74n., 75, 95n.
Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1968)	79, 125
ILL. REV. STAT. ch. 23, § 5-1	5n.
ILL. REV. STAT. ch. 23, § 5-5	4, 5
ILL. REV. STAT. ch. 23, § 6-1	4, 5n.
ILL. REV. STAT. ch. 23, § 7-1	4, 5n.
ILL. REV. STAT. ch. 23, § 6-1.3	5
ILL. REV. STAT. ch. 23, § 7-2	5
ILL. REV. STAT. ch. 38, § 81-21 (1975)	51
Act of Nov. 17, 1977, P.A. 80-1091, § 1, ILL. REV. STAT. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1977)	4, <i>passim</i>
P.A. 81-1078, § 1, ILL. REV. STAT. ch. 38, § 81-21 (Supp. 1979)	51, 53

Rules, Regulations and Comments on Regulations

S. Ct. R. 15(c)	34n., 36n.
7 C.F.R. § 272.1(b)	128n.
42 C.F.R. § 431.53	95n.
42 C.F.R. § 431.625(c)	126
42 C.F.R. §§ 435.110-223	71
42 C.F.R. §§ 435.300-325	72
42 C.F.R. § 440.50(a)	95n.
42 C.F.R. § 440.230	25, 85, 87, 88, 89, 90, 98
42 C.F.R. § 463.16(c)	85
42 C.F.R. § 463.27	85
45 C.F.R. § 249.10(a)(5) (1972)	86
38 Fed. Reg. 15580-81 (1973)	86
39 Fed. Reg. 16970-71 (1974)	87

43 Fed. Reg. 4570 (1978)	105, 123
43 Fed. Reg. 4833 (1978)	106
43 Fed. Reg. 31868-79 (1978)	10n., 12, 123
43 Fed. Reg. 45228 (1978)	87n.
43 Fed. Reg. 57253 (1978)	87n.
44 Fed. Reg. 61597-98 (1979)	12
DHEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, SUPP. D (1967)	79, 86, 89, 94
DHEW INFORMATION MEMORANDUM APA-IM-71-7 (1971)	128n.
DHEW, MEDICAL ASSISTANCE MANUAL	79
DHEW, <i>Relationship of PSRO Review Responsibilities to the Medicaid Program</i> , ACTION TRANSMITTAL SRS-AT-76-141 (Sept. 3, 1976)	87

Other Authorities

106 CONG. REC. (1960):	
p. 16925	95n.
p. 17210	95n.
118 CONG. REC. (1972):	
pp. 1017, 1019	82n.
pp. 33898-99	80, 81, 126
122 CONG. REC. (1976):	
p. 19439	113n.
p. 20410	108n.
p. 20411	108n.
p. 20885	110n.
p. 26786	110n.
p. 26789	108
p. 27673	110n.
p. 27764	110
p. 30895	109
p. 30896	110n.
p. 30897	108
p. 30899	110n.
p. 30990	113n.
p. 30996	110
p. 33868	110n.

123 CONG. REC. (daily ed. June 17, 1977):	
p. H6082-83	117
p. H6084-85	116n.
p. H6088	116n.
p. H6089	116n.
p. H6090	108n., 110n., 111
p. H6096	108n.
p. H6097-98	107
123 CONG. REC. S10177-78 (daily ed. June 20, 1977)	111n.
123 CONG. REC. S10803 (daily ed. June 27, 1977)	110
123 CONG. REC. (daily ed. June 29, 1977):	
p. S11038	116n.
p. S11039-40	111n., 116n.
p. S11041	116n.
123 CONG. REC. H8348 (daily ed. Aug. 2, 1977)	108n.
123 CONG. REC. H10134 (daily ed. Sept. 27, 1977)	111n.
123 CONG. REC. (daily ed. Oct. 12, 1977):	
p. H10829	109
p. H10830	108n.
p. H10835	116n.
p. H10866	109
123 CONG. REC. (daily ed. Nov. 3, 1977):	
p. H12174	111n.
p. S18584-85	109, 116n.
p. S18589	111n.
123 CONG. REC. S18791 (daily ed. Nov. 4, 1977)	111n.
123 CONG. REC. H12489 (daily ed. Nov. 29, 1977)	116n.
124 CONG. REC. (daily ed. June 13, 1978):	
p. H5358	111n., 116n.
p. H5360	111n.
124 CONG. REC. (daily ed. Oct. 12, 1978):	
p. S18439-40	105, 106
p. S18443	109
125 CONG. REC. (daily ed. June 27, 1979):	
p. H5213	111n.
p. H5233	116n.
p. H5254	109n.
p. H5257	112n., 113n.
p. H5261	109

125 CONG. REC. (daily ed. July 19, 1979):	
p. S9852	116n.
p. S9853	109, 110
p. S9860	113n.
125 CONG. REC. S13574 (daily ed. Sept. 27, 1979)	116n.
125 CONG. REC. (daily ed. Sept. 28, 1979):	
p. H8762	112n.
p. S13737	113n.
125 CONG. REC. H8855 (daily ed. Oct. 9, 1979)	112n.
125 CONG. REC. H9884-85 (daily ed. Oct. 30, 1979) ..	108n., 112n.
125 CONG. REC. S15975 (daily ed. Nov. 6, 1979)	113n.
125 CONG. REC. S16712 (daily ed. Nov. 15, 1979)	113n.
125 CONG. REC. (daily ed. Nov. 16, 1979):	
p. H10955	112n.
p. H10959	112n.
125 CONG. REC. (daily ed. Dec. 11, 1979):	
p. H11770-72	119, 120n.
p. H11771-73	120
p. H11774	120
p. H11776	119
p. H11787	119
<i>Departments of Labor and HEW Appropriations for</i> <i>1979: Hearings before the Subcommittee on the De-</i> <i>partments of Labor and HEW of the House Commit-</i> <i>tee on Appropriations, 95th Cong., 2d Sess., Pt. 2</i> <i>(1978)</i>	<i>107</i>
DHEW, AID TO FAMILIES WITH DEPENDENT CHILDREN, 1975 RECIPIENT CHARACTERISTICS STUDY: PART 3 (1978)	17n.
DHEW, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER THE SOCIAL SECURITY ACT TITLE IV-A: NEED ELIGIBILITY ADMINISTRATION (1978)	18n.
DHEW, HEALTH CARE FINANCING ADMINISTRATION, OF- FICE OF RESEARCH, DEMONSTRATIONS AND STATISTICS, QUARTERLY REPORT: MEDICAID FINANCED ABORTIONS UNDER P.L. 95-205 (August 11, 1979)	9

GAO, REP. NO. HRD-79-96, SIMPLIFYING THE MEDICARE/ MEDICAID BUY-IN PROGRAM WOULD REDUCE IMPROPER STATE CLAIMS OF FEDERAL FUNDS (1979)	126n.
H.R. REP. NO. 213, 89th Cong., 1st Sess. (1965)	74, 75, 76, 77, 89, 95n.
H.R. REP. NO. 393(I), 95th Cong., 1st Sess. (1977)	84
H.R. REP. NO. 673, 95th Cong., 1st Sess. (1977)	85n.
H.R. REP. NO. 1555, 94th Cong., 2d Sess. (1976)	105
IDPA, ANNUAL REPORT 1978 (1979)	4, 70, 72
95 Kurland & Casper, LANDMARK BRIEFS AND ARGU- MENTS OF THE SUPREME COURT OF THE UNITED STATES: • CONSTITUTIONAL LAW (1976 Term. Supp.)	46n.
Medicare and Medicaid, Hearings Before Senate Com- mittee on Finance, 91st Cong., 2d Sess. (1970)	82n.
ROMNEY, GYNECOLOGY AND OBSTETRICS—THE HEALTH CARE OF WOMEN (1975)	64n.
S. REP. NO. 222, 91st Cong., 1st Sess. (1969)	80
S. REP. NO. 223, 91st Cong., 1st Sess. (1969)	125
S. REP. NO. 274, 96th Cong., 1st Sess. (1979)	119n.
S. REP. NO. 404, 89th Cong., 1st Sess. (1965)	74, 76, 77, 89
S. REP. NO. 744, 90th Cong., 1st Sess. (1967)	78
S. REP. NO. 1230, 92d Cong., 2d Sess. (1972)	81, 82n.
S. REP. NO. 1356, 93d Cong., 2d Sess. (1974)	127
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976)	88n.
WILLIAMS, OBSTETRICS (1976)	64n.
R. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049 (1979)	68
W. Bennett, Professional Standards Review Organiza- tions—Philosophy and History, 1975 UTAH L. REV. 355	82n.
Blattner et al., Pregnancy Outcome in Women with Sickle Cell Trait, 238 J.A.M.A. 1342 (1977)	64n.
Gallus et al., Prevention of Venous Thrombosis with Small Subcutaneous Doses of Heparin, 235 J.A.M.A. 1980 (1976)	64n.

Gant et al., Clinical Management of Pregnancy-Induced Hypertension, 21 CLINICAL OBSTETRICS & GYNECOLOGY 397 (1978)	64n.
Gosfield, Medical Necessity in Medicare and Medicaid: The Implications of Professional Standards Review Organizations, 51 TEMPLE L. REV. 229 (1978)	82n.
Levine & Colea, When Pregnancy Complicates Chronic Granulocytic Leukemia, 13 CONTEMPORARY OB/GYN 49 (1979)	64n.
Morrison & Wiser, The Use of Prophylactic Partial Ex- change Transfusion in Pregnancies Associated with Sickle Cell Hemoglobinopathies, 48 OBSTETRICS & GY- NECOLOGY 516 (1976)	64n.
Perry, The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government, 66 GEO. L. J. 1191 (1978)	54n.
Ueland, Cardiovascular Diseases Complicating Preg- nancy, 21 CLINICAL OBSTETRICS & GYNECOLOGY 429 (1978)	64n.
Memorandum for the Secretary of HEW in Opposition to Application for Stay in <i>Buckley v. McRae</i> , U.S. Sup. Ct. No. A-346 (Nov., 1977)	123
Memorandum for the United States as Amicus Curiae in <i>Beal v. Doe</i> , U.S. Sup. Ct. No. 75-554 (March, 1976)	97
Memorandum for the United States as Amicus Curiae in <i>New York State Department of Social Services v. Klein</i> , U.S. Sup. Ct. Nos. 72-770, 72-803 (May, 1973)	97
Petition for Certiorari in <i>Poelker v. Doe</i> , 432 U.S. 519 (1977)	45n.
H.R. 4962, 96th Cong., 1st Sess. (Dec. 11, 1979)	119
S. 1204, 96th Cong., 1st Sess.	119n.

In The
Supreme Court of the United States

October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D.,

Appellants,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-5

JEFFREY MILLER, Acting Director, Illinois Department of Public Aid,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-491

UNITED STATES OF AMERICA,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

On Appeals from the United States District Court for the Northern District of Illinois

BRIEF OF APPELLEES

OPINIONS BELOW

The Brief for the United States (at 2) adequately sets forth the opinions below.

JURISDICTION

The Brief for the United States (at 2) adequately sets forth the grounds on which the jurisdiction of this Court is invoked. Further discussion of the Court's jurisdiction appears at pp. 28-37 *infra*.

QUESTIONS PRESENTED

1. Does the fourteenth amendment permit Illinois to deny medically necessary abortion services to indigent pregnant women, while providing all other medically necessary services under its medical assistance programs for the poor?

2. A. Does Title XIX of the Social Security Act allow Illinois to provide medically necessary care generally to all recipients for all conditions, except services for pregnant women suffering from conditions making an abortion medically necessary?

B. Do successive riders to annual HEW appropriations laws, providing that no federally appropriated funds shall be used to perform abortions except in narrow circumstances, impliedly repeal all the requirements imposed by Title XIX on the states with regard to medically necessary abortion services?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Social Security Act, 42 U.S.C. §§ 1320c(1) (1976); 1320c-1(a), (b)(1), (e) (1976), *as amended by* Pub. L. No. 95-142, § 5(a), (o)(1), 91 Stat. 1175 (1977); 1320c-4(a)(1)(A), (B), (2) (1976), *as amended by* Pub. L. No. 95-142, § 5(d)(3)(B)(i), (o)(2), 91 Stat. 1175 (1977); 1320c-5(a), (b) (1976); 1320c-7(a) (1976), *as amended by* Pub. L. No. 95-142, § 22(a)(1), 91 Stat. 1175 (1977); 1320c-8 (1976); 1320c-9 (1976), *as amended by* Pub. L. No. 95-142, § 5(e), (o)(3), 91 Stat. 1175 (1977); 1320c-13 (1976); 1320c-20(d)(1), (3)(A) (1976), *as amended by* Pub. L. No. 95-142, § 5(d)(2)(D), 91 Stat. 1175 (1977); 1396 (1976); 1396a(a)(10), (13)(A)-(C), (17), (19), (22), (30) (1976); 1396b(a)(1)-(6) (1976), *as amended by* Pub. L. No. 95-142, §§ 10(a), 17(a), 91 Stat. 1175 (1977); 1396b(p) (1976), *as amended by* Pub. L. No. 95-142, § 11(a), 91 Stat. 1175 (1977); 1396d(a) (1976), *as amended by* Pub. L. No. 95-210, § 2(a), 91 Stat. 1485 (1977). These statutes are reprinted at Appendix B hereto, pp. 4a-23a *infra*.

3. Joint Resolution (H. J. Res. 440) making further continuing appropriations for the fiscal year 1980, Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979), reprinted in the Appendix to the Brief for the United States at 1a.

4. Regulations of the United States Department of Health, Education and Welfare, 42 C.F.R. §§ 435.903,

440.210-.230, .260 (1979), reprinted at Appendix C hereto, pp. 24a-25a *infra*.

5. ILL. REV. STAT. ch.23, §§ 5-5, 6-1, 7-1 (Supp. 1977), reprinted in the Appendix to the Brief for the United States at 2a-4a.

6. Medical Assistance Program Rules of the Illinois Department of Public Aid (as contained in the Handbooks for Physicians and for Hospitals), reprinted in the Appendix to Appellant Miller's Brief at 7a-67a, and at Appendix A hereto, pp. 1a-3a *infra*.

STATEMENT*

A. The Illinois Medical Assistance Programs.

About one million indigent persons in Illinois participate in the state's medical assistance programs: the Medicaid and the state-funded General Assistance ("GA") and Aid to the Medically Indigent ("AMI") programs (IDPA, ANNUAL REPORT 1978, at 19, 28). With the single exception of abortion services (P.A. 80-1091, ILL. REV. STAT. ch.23, §§ 5-5, 6-1, 7-1 (Supp. 1977) at U.S. App. 3a-4a**), the Illinois legislature has mandated

* The prior proceedings in this case are adequately set forth in the Brief of the United States at pp. 6-15.

** The following designations are used to refer to the documents filed with this Court in this litigation:

"U.S. Br." or "U.S. App."—Brief or Appendix to the Brief of the United States (No. 79-491);

"St. Br." or "St. App."—Brief or Appendix to the Brief of Appellant Miller (No. 79-5);

"Int. Br."—Brief of Intervenor (No. 79-4);

"U.S.J.S. App."—Appendix to the Jurisdictional Statement of the United States;

"A."—Appendix; "R"—Record item (numbered according to the list of items transmitted to this Court by the district court on June 20, 1979).

that these programs cover necessary medical care.* Payments for services are made to the medical providers, not to recipients. Every recipient receives a medical eligibility card which, when presented to a participating provider, entitles the recipient to services (St. App. 8a: § 110).

Except with regard to abortion services, the legislature has delegated to the Illinois Department of Public Aid ("IDPA") the task of promulgating rules for provision of services under the medical assistance programs. ILL. REV. STAT. ch.23, §§ 5-5, 6-1.3, 7-2. These rules (portions of which are reprinted at St. App. 7a-67a), declare as their objective the provision of "essential medical care . . . necessary to preserve health [and] alleviate sickness" (St. App. 7a: § 102) and define covered services generally as "reasonably necessary medical and remedial services . . . recognized as standard medical care required because of illness, disability, infirmity, or impairment, and which are necessary for immediate health and well-being" (*id.* at 13a: § A-203; *see id.* at 7a: § 102).

This general standard is reiterated in the context of particular services. For example, "[c]overed surgical procedures which are medically necessary are allowable" (St. App. 43a: § A-242.2; *see id.* at 14a: § A-204.s, 17a: § A-205.2). Office visits to a physician in connection with a particular medical problem are covered (*id.* at 24a: § A-220), as are "essential inpatient, outpatient and clinic diagnostic and treatment services"

* "Essential medical care," ILL. REV. STAT. ch.23, § 5-1 (Medicaid); "any necessary treatment . . . required because of illness or disability," ILL. REV. STAT. ch.23, § 6-1 (U.S. App. 4a) (GA); and "necessary medical . . . care," ILL. REV. STAT. ch.23, § 7-1 (U.S. App. 4a) (AMI).

(*id.* at 51a: § H-203). The “medical necessity” of inpatient hospital admission and the “medical necessity” of the length of stay are the standards for approving coverage of inpatient hospital services (*id.* at 59a: § H-213). None of the services, except abortion, is subject to the condition that it be necessary to preserve the recipient’s life.*

The Illinois medical assistance programs cover some services which are not “medically necessary” (*see, e.g.,* St. App. 17a: § A-205.2, 40a: § A-226). But in general the programs exclude coverage of non-medically necessary services (*id.* at 14a: § A-204, 53a: § H-204.17).**

B. Medical Assistance Program Abortion Services In Illinois.

Prior to the legalization of abortion in Illinois in 1973, thousands of indigent Illinois women required hospitalization for the effects of illegal or self-induced abortions (R.22: ¶15; R.17: Exh.H). Many of these women suffered serious medical complications (R.22: ¶17; R.17: Exh.H). A large number had to undergo surgery, including, in a number of cases, removal of the uterus (R.22: ¶17). The legalization of abortion contributed to a dramatic reduction in illegal and self-induced abortions, in the abortion mortality rate, and in the number of medical complications arising from abortions (R.22: ¶s11-14; R.17: Exhs.F-6, -8, H-2).

* Because of the injunction in this case, the current rules allow reimbursement for medically necessary abortions (St. App. 15a: § A-205.1).

** For the non-medical necessity of some of the treatments limited or excluded by the Illinois program, *see* R.100: p.6-7n.

From the time of the legalization of abortion until the passage of P.A. 80-1091, the statute at issue in this case, the Illinois medical assistance programs covered all abortion services—both medically necessary and elective—for indigent pregnant women. During 1977, the last year of such coverage, IDPA paid for 25,104 abortions (R.20: Exh.C); of those abortions, 1,330 were performed for teen-agers 15 years old and younger (*id.*).

P.A. 80-1091 went into effect on December 15, 1977, but because of various injunctions in this case, Illinois has been required to cover all medically necessary abortions almost continuously since January 11, 1978.* During 1978, the Illinois medical assistance programs covered 10,666 medically necessary abortions billed by physicians (R.101: Exh.F). This compares with 21,663 abortions billed by physicians during 1977 when the medical assistance programs covered both elective and medically necessary abortions (R.101: Exh.F-3).**

The costs of prenatal care, childbirth and post-partum care are over seven times the cost to the state of abortion (R.111: Exh.A; R.101: Exh.F). If the newborn child receives public aid, the cost differential is even greater

* The initial injunction was issued by the Seventh Circuit, pending appeal, on January 11, 1978. Subsequent injunctions were issued by the District Court on May 15, 1978 (R.64), and April 30, 1979 (R.122). The only time during this period that P.A. 80-1091 was in effect was from May 1 to May 14, 1978 (R.48: Exh.C-3).

** The difference in numbers of abortions covered for 1977 reported in the previous paragraph is because the larger number includes approximately 3,500 abortions billed by hospitals, in addition to the 21,663 abortions billed by individual physicians. At the time of Judge Grady’s April 30, 1979, ruling, at which point the record closed, IDPA had not compiled figures for total abortions reimbursed (including those billed by hospitals) for 1978.

(R.17: p. 23n., Exh.E). Even when the state bears 100% of abortion costs and only 50% of childbirth costs (because federal matching payments are available for the latter), the average cost to the state of childbirth and support payments for the first year of the child's life is over nine times the average cost to the state of an abortion (R.111: p. 8n.2, Exh.A; R.101: Exh.F). The costs to the state of caring for women suffering complications from illegal or self-induced abortions (R.17: Exhs.E, H-2, -3; R.22: ¶s 5-10) and treating complications associated with pregnancy (R.111: p. 8n.2, Exh.B) make the cost differential even more dramatic (R.111: p.8).

C. Number Of Abortions Performed Under A Restrictive Standard Excluding Most Medically Necessary Abortions.*

To enable the state to receive federal reimbursement, medical assistance program providers have had to report the number of abortions performed which would meet the various funding standards in the appropriations acts popularly known as the annual Hyde Amendment. Reports on federal reimbursement to Illinois for such abortions provide a rough measure of the number of abortions that would have been covered under P.A. 80-1091.** During 1978, physicians certified to

* Appellees' challenge is to the restrictive standard of the Illinois legislation, P.A. 80-1091 (see p. 4 *supra*), and reference herein to the "Illinois standard" or the like is to that restrictive standard. Both factual and legal discussions, however, will necessarily draw on material addressed to the somewhat different and varying restrictive standards of the annual Hyde Amendments from 1978 to 1980.

** At the time these federal funding figures were reported, the Hyde Amendment funded abortions required because of "severe and longlasting physical health damage" in addition to those necessitated because the woman's life would be en-

(Footnote continued on following page)

IDPA approximately twenty-seven abortions a month as meeting Hyde Amendment standards (R.101: Exh.H). This total is less than 3% of medically necessary abortions Illinois physicians billed to IDPA in 1978 (R.101: Exh.F; R.100: p.9), and is only 1.3% of all abortions (both medically necessary and elective) performed in 1977 (R.20: Exh.C).* Physicians certified only 1.9% of all medically necessary abortions they billed to IDPA in 1978 as ones necessary to preserve the pregnant woman's life (R.101: Exh.F).

D. The Relationship Of Illinois' Abortion Funding Standards To Medical Practice.

The standards of P.A. 80-1091 and successive Hyde Amendments are alien to accepted standards of medical practice in several ways (see A.103: ¶4; A.119: ¶13; A.124: ¶15). First, the language of the restrictive standards calls for physicians to make, with respect to individual women patients, predictions that mortal injury

Footnote continued

dangered (U.S. App. 2a). Data from other states suggest that the different restrictive standards do not lead to substantially different numbers of certified abortions (R.101: Exh.G-8 to -12). In any case, the current Hyde Amendment is virtually identical to P.A. 80-1091 (U.S. Br. 9-10). Even the very small number of abortions reported in the text is thus likely to be somewhat larger than the number under either the current Hyde Amendment standard or that of P.A. 80-1091.

* HEW figures for the period from October 1, 1978, through June 30, 1979, show an even smaller number of federally reimbursed abortions certified in Illinois, averaging approximately thirteen abortions per month. DHEW, HEALTH CARE FINANCING ADMINISTRATION, OFFICE OF RESEARCH, DEMONSTRATIONS AND STATISTICS, QUARTERLY REPORT: MEDICAID FINANCED ABORTIONS UNDER P.L. 95-205 (August 11, 1979), at Attachment B; see also *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9977-78 (slip op. at 58-59) (E.D.N.Y. Jan. 15, 1980).

will certainly or very likely occur. The version of the Hyde Amendment in effect at the time of the district court decision required a physician to determine that the life of the pregnant woman "would be endangered,"* or that "severe and long-lasting physical health damage would result" without an abortion. P.A. 80-1091 requires a physician to determine that an abortion is "necessary for the preservation" of the pregnant woman's life. With rare exceptions, the current state of medical knowledge does not enable a physician to determine with reasonable certainty that a medical condition or illness will give rise to death (A.31: ¶7; A.103-04: ¶5; A.125-28: ¶6; A.114: ¶4, A.119-21: ¶s14,15).

Second, a physician ordinarily cannot predict, even with a lesser degree of certainty, either the severity or duration of health damage, or that pregnancy will result in death, or in shortening of life, or in some less severe damage (A.31: ¶7; A.33-34: ¶13; A.104: ¶6; A.125-28: ¶9). For example, a woman suffering from malnutrition or essential hypertension is at high risk of some adverse consequences as a result of pregnancy (A.34: ¶13). But whether either of these conditions in a particular woman is likely to result in preeclampsia (a condition characterized by significant elevation of blood pressure, significant protein loss in the urine, and edema, which in turn accelerate the likelihood of vascular disease, stroke, organ damage, and diabetes, A.32-33: ¶11), and whether the preeclampsia, if it arises, will cause a particular severe and long-lasting physical health problem, or a shortening of life, or

* These words "require a finding that an event *would occur* if the fetus were carried to term." HEW Comments on final regulations on federal funding under the Hyde Amendment, 43 Fed. Reg. 31876 (July 21, 1978) (emphasis in original).

death, is impossible for a physician to predict accurately (A.33-34: ¶s12, 13; A.104: ¶6; A.125: ¶6(a)).

Third, many conditions can be identified as posing a serious threat to life only late in pregnancy, when the time for safe abortion has passed (A.105: ¶8; A.121: ¶16). While a medically necessary abortion ordinarily can be performed safely early in the pregnancy, especially in the first trimester, the medical risks from abortion itself increase linearly thereafter (A.30: ¶5; A.105-06: ¶s8, 9; R.101: Exh.G-7). A woman with a pre-existing uterine fibroid tumor, for example, is seriously threatened with complications (hemorrhage, spontaneous abortion, complications in labor) if the tumor grows (A.125-26: ¶6(b)). But the tumor often does not exhibit signs of growth until the second trimester of pregnancy, and a physician under the restrictive standards will thus be precluded from certifying a patient during the time that an abortion can be performed safely (A.126: ¶6(b)).* Even those conditions which have been identified as leading causes of maternal death in Illinois (e.g., toxemia and hemorrhage) may not be diagnosed as life-threatening, rather than merely health-threatening, until mid- or late pregnancy (R.101: Exh.I-2; A.105: ¶8).

Fourth, physicians do not ordinarily make medical evaluations in terms of "life" risks. The standard thus

* A similar example emerges from the situation of plaintiff Jane Doe. Thus, Dr. Zbaraz could not—even during the second trimester of pregnancy—have certified Jane Doe under the Illinois or Hyde Amendment standards, even though her condition—severe varicose veins, previously surgically treated, and a history of thrombophlebitis—can, in some cases, result in death or severe and long-lasting physical health damage. Signs of such permanent consequences which would have permitted even an uncertain prediction might not have arisen in her case until comparatively late in pregnancy. (A.127: ¶6(d).)

has no meaning to them (A.104: ¶7; A.119: ¶s13, 14). Even if a physician could predict with reasonable certainty that pregnancy and childbirth would shorten a woman's life by several years, it is unclear whether this prospect would meet the standard (A.104-05: ¶7; see A.119-20: ¶14). The medical assistance program rules contain no other similar standards (St. App. 7a-67a). When IDPA has sent out notices and Physicians' Handbook revisions informing providers of its intent to implement either P.A. 80-1091 or the Hyde Amendment standards, it has repeated the language of the law without clarification or explication (R.17: Exh.B; R.101: Exh.A-2 to -4; R.114: Exh.F). The same is true of the Department of Health, Education and Welfare ("HEW") regulations (43 Fed. Reg. 31868-79 (July 21, 1978), 44 Fed. Reg. 61597-98 (Oct. 26, 1979)). The record offers no indication that a life-preservation standard could be clarified or explained in a manner physicians could apply.

Finally, physicians believe that the new abortion funding standards have been established with an intent to prevent abortions and, therefore, are reluctant to certify any patients under these standards (A.109: ¶15; A.120: ¶14).

Insofar as these factors require physicians to wait before certifying even a small number of abortions as meeting the standard, the effect is to restrict abortions to those performed after the 28th week of pregnancy. This would increase the risks of morbidity and mortality to indigent women (A.112; see *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9988-90, 10,005-06 (slip op. at 92-101, 157-58) (E.D. N.Y. Jan. 15, 1980)).

E. Application Of A Standard Of Medical Necessity To Provision Of Abortion Services.

"Medical necessity" is the standard by which physicians evaluate the need for medical intervention (A.106-07: ¶11; A.116: ¶6; A.129: ¶7). It is the standard, abortion excepted, for coverage of services under Illinois' medical assistance programs (see pp. 5-6 *supra*) and under federal law (see pp. 81-88 *infra*).

As applied to pregnancy and abortion, the standard of medical necessity enables a physician to determine, during early stages of pregnancy, that an individual pregnant patient with a particular health profile runs a higher than normal risk of adverse consequences to her health if her pregnancy is carried to term (A.106: ¶11). A physician's evaluation of what constitutes an excessive risk depends on a comparison with the risk to the population of healthy pregnant women (*id.*). Where a patient's condition presents an abnormal risk to her health, and she has a firm wish to terminate her pregnancy, an abortion is medically necessary (A.107: ¶11; A.128: ¶6(d); A.129: ¶7; see *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9990 (slip op. at 101) (E.D. N.Y. Jan. 15, 1980)).

The incidence of such abnormal risks varies with the characteristics of the patient population a physician sees and the medical judgment of individual physicians (A.107: ¶11). Within these parameters, it is estimated that between 20% and 50% of abortions that physicians perform are medically necessary (*id.*; see A.116: ¶7; A.38: ¶6; R.38: Exhs.A-3, C-2, D-5).

Numerous abortions which physicians deem to be medically necessary do not meet the Illinois standard (A.32-37: ¶s12-17; A.110-11: ¶17; A.114-15: ¶s4-5; A.125-28: ¶6; A.129: ¶8). Pregnant women suffering from es-

sential hypertension face a significant risk of developing convulsive seizures, hemorrhage, and aspiration pneumonia (A.110: ¶17). Pregnant women with sickle cell anemia risk kidney malfunction, hemorrhage, and sickle cell crisis which can result in death (*id.*; A.128: ¶6(e)). Malnutrition creates a much higher than normal risk of health injury: toxemia, infection, premature labor, anemia, and a likelihood of delivery by caesarean section (which, in turn, poses a 26-fold increased risk of mortality over vaginal delivery) (A.110:¶17). A diabetic woman exhibiting even slight retinal eye damage is at risk in pregnancy of death or permanent or recurring blindness (A.111: ¶17). Pregnancy may exacerbate the condition of a woman with kidney disease, resulting in the possibility of severe infection, septic shock, and kidney loss (*id.*). Child-birth may accelerate the deterioration of the lung function in a woman with chronic lung disease (A.32: ¶11). A woman with a history of mental health problems, if forced to carry her pregnancy to term, may engage in such self-destructive behavior as self-starvation, self-inflicted injury, and suicide (A.115: ¶4). These examples are far from exhaustive (A.31: ¶9; see *Hodgson v. Board of County Commissioners*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,159 at 10,070 (8th Cir. Jan. 9, 1980); *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9991-93, 9994-96 (slip op. at 103-16) (E.D. N.Y. Jan. 15, 1980); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 12 (D. Conn. Jan. 7, 1980) (citing "thorough, though not exhaustive, list of 21 conditions," compiled by HEW, that may indicate the medical necessity for an abortion).

In some situations, physicians have more than one choice of treatment for a pregnant woman whose condition is such that she has a medical need for an abortion

(A.108: ¶14). But abortion often remains the "medically preferred choice" (*id.*) for a number of reasons.

First, alternative forms of treatment "are likely to be more radical, less effective, and thus less medically desirable than abortion" (A.117: ¶9). Generally, alternative treatment often poses more dangerous risks of its own. This is particularly true of drug treatment, where remote, adverse consequences often cannot be determined for years (A.108-09: ¶14, citing common use of DES in the 1950's; see also A.117: ¶9, drug therapy can harm the fetus; stopping such therapy can endanger the woman's health).

Second, patients with unwanted pregnancies, needing medically necessary abortions, often have neither the will nor the ability to cooperate with special treatment to lessen the abnormal risks of their pregnancies (A.108: ¶14; A.117: ¶9). A drug addict with an unwanted pregnancy, for example, is unlikely to seek out any medical care at all during pregnancy (A.130: ¶9). "In considering whether an abortion were 'medically necessary' for such a woman, a physician would have to weigh the possibility that she could terminate her drug use and receive regular medical attention against the actual likelihood that she would do so" (*id.*; see *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9993 (slip op. at 111) (E.D. N.Y. Jan. 15, 1980)).

Finally, alternative treatment at best can only somewhat increase a woman's chance of avoiding adverse health consequences. It can rarely render an abnormal risk normal, "because the course of a patient's illness is neither altogether controllable nor altogether predictable" (A.130: ¶10).

F. The Effect Of Illinois' Abortion Funding Restrictions On Indigent Pregnant Women And Teen-Agers.

Pregnancy poses greater health risks to more members of particular populations than to women in general (A.34-37: ¶s15-17; A.107-08: ¶13; A.117-18: ¶s10-11; A.126-27: ¶6(c); A.130-31: ¶11; R.21: App. 3-6). Adolescent females are such a high-risk group (A.35: ¶16; A.126: ¶6(c)). Complications of pregnancy and childbirth are from 9 to 25% more frequent for members of this group than for women between the ages of twenty and twenty-four (A.35: ¶16). Pregnant adolescents are more prone to develop anemia and malnutrition (*id.*), to suffer from toxemia and pre-eclampsia (A.126: ¶6(c)), and to require surgical intervention and caesarean section for delivery (*id.*; A.35: ¶16; *see* A.108: ¶13; A.118: ¶11; R.21: App. 4-6; *see also* *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9999-10,003 (slip op. at 133-50) (E.D. N.Y. Jan. 15, 1980)).

Poverty is the common denominator of recipients of the Illinois medical assistance programs. Poor women have a much higher maternal mortality rate than do women generally (A.36: ¶17; A.130: ¶11; R.21: App. 2 (Table 1)). A greater proportion of poor women have, or develop during pregnancy, certain medical problems than occur among the female population generally. Such problems, when they affect poor women, are more serious than when they affect other women (A.36: ¶17; A.107-08: ¶13; A.117-18: ¶10; A.130-31: ¶11; *see* *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9990-91 (slip op. at 101-03) (E.D. N.Y. Jan. 15, 1980); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 13 (D. Conn. Jan. 7, 1980)). These conditions include anemia, malnutrition (especially protein depletion), rheumatic heart disease, essential

hypertension, and sickle cell disease, the last being almost unique to the black population (A.36-37: ¶17; A.107-08: ¶13; A.131: ¶16). Statistically, poor women are more likely than non-poor women to suffer mental health problems from unwanted pregnancy (A.117: ¶10). There is a higher incidence of depressive illness and a higher rate of hospitalization for mental illness among the poor (*id.*). Poverty thus exacerbates the risks of childbirth. It also lessens the practical value of alternative treatments for women with a medical need for abortion.

Poor women also have less access to alternative treatment for high risk pregnancies. Pregnancy and childbirth create a far greater health risk for a woman with a moderate health-threatening condition who is unable to get extra bed-rest than for a woman with the identical condition who is able to do so (A.36: ¶17). But bed-rest may be impossible for poor women who cannot afford to leave badly needed jobs* or to obtain outside help with chores or children (A.36: ¶17; A.118: ¶10).

For the same familial and job reasons which make simple bed-rest unavailable, poor women may not be able to make frequent visits to doctors. Because they are more likely to be under stress generally, they are less able to cope with medical problems (A.117: ¶10). They have less access to medical facilities treating such special risks and are less likely to seek medical care before they suffer acute need (A.118: ¶10). And for those who are willing and able to make such visits, adequate medical facilities are often unavailable—even in the

* In approximately 24,000 Illinois AFDC recipient families, the mother is employed. DHEW, AID TO FAMILIES WITH DEPENDENT CHILDREN, 1975 RECIPIENT CHARACTERISTICS STUDY: PART 3, at 15 (1978).

Chicago area, where the majority of Illinois medical assistance program recipients reside (A.131: ¶11; A.108: ¶13; A.37: ¶17; A.118-19: ¶10; R.21: App.3). A poor woman with a pregnancy necessitating special medical care will probably fare far worse than other women: she will be less able to get either the mental health or prenatal care that she needs, and she may have to give up needed employment and thereby be without financial resources to care for herself and her family (A.118: ¶10; see *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9996 (slip op. at 121-22) (E.D. N.Y. Jan. 15, 1980)).

A poor woman will be unlikely to have or be able to get the funds necessary to obtain a medically necessary abortion. For the overwhelming majority of such women, the cost of a legal abortion may well exceed the monthly cash welfare grant provided for their families' non-medical subsistence needs (i.e., food, clothing, shelter) (R.17: p.28n., Exh.L).^{*} Before passage of P.A. 80-1091, defendant Miller's predecessor stated that it "would effectively result in the denial of a medical procedure, abortion, to low-income persons who depend on public assistance programs for payment of medical bills" (R.8: Exh.A).^{*} See generally, *McRae v. Secretary of*

^{*} Those payments are already, in certain respects, below need for non-medical assistance items. *Illinois Welfare Rights Organization v. Trainor*, 438 F.Supp. 269 (N.D. Ill. 1977). Only 22 state plans (of 54) even purport to pay 100% of the state-established standard of need to AFDC recipients without other income. DHEW, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER THE SOCIAL SECURITY ACT TITLE IV-A: NEED ELIGIBILITY ADMINISTRATION, 234-35 (1978).

^{**} In New Jersey, during a period when a life-endangerment funding restriction similar to Illinois' was in effect, births to Medicaid-eligible women increased by 30%, while the number

(Footnote continued on following page)

HEW, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9983-84, 10,005 (slip op. at 75-77, 158) (E.D. N.Y. Jan. 15, 1980); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 13-14 (D. Conn. Jan. 7, 1980).

Plaintiff Jane Doe was an indigent pregnant woman whose condition made an abortion medically necessary. At the time she joined this lawsuit, Jane Doe was thirty-eight years old, had had nine previous pregnancies and had a history of varicose veins and thrombophlebitis (A.93-94: ¶s5A, 5B). Continuation of her pregnancy would have resulted in a recurrence of her varicose veins, requiring surgery for their removal (A.92: ¶12). It would also have posed a significant risk of deep vein thrombophlebitis, a medical condition that impairs circulation and requires prolonged hospitalization and bed-rest (*id.*). But bed-rest was simply unavailable to a woman like Jane Doe with small children, subsisting on public assistance (A.130: ¶19). An abortion was medically necessary for her, though not necessary to preserve her life (A.92: ¶13; see A.110: ¶17).

Jane Doe's total monthly income for herself and her four dependent children was \$374 (A.93: ¶15A; R.17: Exh.L). She wished to terminate her pregnancy (A.89: ¶12), but because of her indigency Jane Doe was unable to secure a safe and legal abortion unless such an abortion was funded under the medical assistance program (A.90: ¶13).

Even assuming that some of these women could borrow or otherwise obtain the funds for legal abortions,

Footnote continued

of Medicaid-funded abortions dropped from over 900 per month to under 25 per month. *Right to Choose v. Byrne*, 398 A.2d 587, 594 (N.J. Super. 1979). See *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 13 (D. Conn. Jan. 7, 1980).

the delay in obtaining the money would itself be harmful. "Time of course, is critical in abortion. Risks during the first trimester are admittedly lower than during the later months." *Doe v. Bolton*, 410 U.S. 179, 198 (1973). See *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 14 (D. Conn. Jan. 7, 1980); *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9979-83 (slip op. at 62-72) (E.D. N.Y. Jan. 15, 1980). For women with health problems, delay in obtaining abortion may have even more serious consequences than it would have for healthy women (A.105: ¶ 9).

SUMMARY OF ARGUMENT

I.

A. These appeals present no dispute between adverse parties over the constitutionality of the Hyde Amendment. Accordingly, there is no Article III case or controversy here respecting the constitutionality of the Amendment, and this Court is without jurisdiction to resolve that question on these appeals. See *Muskraat v. United States*, 219 U.S. 346 (1911).

B. This Court nonetheless has appellate jurisdiction under 28 U.S.C. § 1252 over appellants' appeals from the district court's judgment holding that the Illinois statutory abortion funding policy violates the fourteenth amendment. See *McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975). Moreover, whatever the contours of this Court's discretion not to review such additional questions otherwise properly before it, the reasons advanced by the United States (U.S. Br. 26-29) argue persuasively against the exercise of such discretion here,

particularly in light of this Court's setting arguments in *Harris v. McRae*, No. 79-1268, in tandem with those here (Order, Feb. 19, 1980).

II.

A. This Court lacks appellate jurisdiction over the appeals of Illinois (No. 79-5) and the intervenors (No. 79-4) on the statutory issues resolved, and relief granted, by the earlier court of appeals' decision. Neither appellant ever took a timely and proper appeal from that decision.

B. Despite the failure of Illinois and the intervenors properly to appeal statutory issues, this Court can and should consider such issues in this case to avoid the fourteenth amendment question presented. The scope of the statutory issues before the Court depends on whether the court of appeals' judgment was final.

If the court of appeals' judgment was not final, then the question of whether Title XIX, standing alone, requires coverage of medically necessary abortions, and the question of whether the Hyde Amendment relieves states of that responsibility are both properly before the Court as providing in combination an alternative ground for affirming the district court's judgment.

If the court of appeals' judgment was final, it would be *res judicata* and preclude either question from being considered here, except insofar as parties properly sought review of such questions and review is granted. In this circumstance, the principle of avoiding unnecessary constitutional adjudication should be satisfied by granting appellees' Conditional Petition for Certiorari (No. 79-64) to reach the question presented there: whether the Hyde Amendment operated substantively to amend Title XIX.

While the question is not free from doubt, the better view is that the court of appeals' judgment was not final. See *Mathews v. Eldridge*, 424 U.S. 319, 331n.11 (1976); *Catlin v. United States*, 324 U.S. 229, 233 (1945).

III.

A. The district court held that Illinois' withdrawal of medical assistance coverage of medically necessary abortions is unconstitutional. That judgment should be affirmed either on the ground adopted by the district court—failure rationally to further a legitimate state interest—or because the stricter “compelling state interest” test is appropriately applied here where Illinois penalizes exercise of a woman's fundamental rights.

The compelling state interest test is applicable because Illinois discriminates, in the context of its otherwise comprehensive programs of medically necessary care for the poor, against a woman's exercise of her fundamental right of privacy in the abortion decision. The fundamentality of the woman's right in that decision is well established in the decisions of this Court. E.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Colautti v. Franklin*, 439 U.S. 379 (1979). That the discrimination comes in the form of withdrawing funding has never been held either to legitimate that discrimination or to obscure the fact that it is a fundamental right that is disfavored. *Maher v. Roe*, 432 U.S. 464 (1977), says nothing to the contrary, since there was no relevant discrimination in that case. The state there was withholding funding for elective abortions, as it did for other elective procedures.

Illinois' discrimination is both intended to stop as many abortions as possible and is an effective means to

do so, since many indigent women will have no access to funds to obtain medically necessary abortions privately. Others will obtain such abortions only after dangerous delay. This clearly makes it a “penalty” on exercise of fundamental rights. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

B. Regardless of the equal protection standard used to test Illinois' action, the conclusion of unconstitutionality is required, since Illinois' actual purpose was the illegitimate one of preventing indigent women from obtaining medically necessary abortions. The affirmative and effective intent to stop women from exercising their fundamental constitutional rights makes Illinois' action a violation of the rights of those women to due process of the law as well as to equal protection. Illinois cannot rationalize its action as an expression of taxpayer moral judgment, since constitutional constraints exist precisely to prevent taxpayers from using governmental power to impose values they are perfectly free to pursue as individuals. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

The state could have no legitimate interest in childbirth that is abnormal. *Doe v. Bolton*, 410 U.S. 179 (1973); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977). Nor could it have any legitimate interest in protecting potential life or in altering state demographics if that is accomplished through the sickness and deaths of unwilling indigent pregnant women.

The state was not seeking to prevent fraud, which is dealt with otherwise in its medical assistance programs by methods that do not damage recipients' health and threaten their lives. The state was not trying to prevent

doctors from making medically misguided decisions, and this Court's decisions forbid states from rationalizing anti-abortion measures in such terms. *E.g.*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). The state was not trying to save money, since refusal to fund medically necessary abortions costs the state a substantial amount of money.

Even if these fictitious purposes were available to Illinois as justification, they would not help the Illinois statute withstand constitutional scrutiny. None of them is compelling in the pre-viability stage of pregnancy; and none of them is even rationally served by Illinois' reckless willingness to sacrifice the actual lives of some indigent pregnant women, the actual health of many others, the privacy interests of all women in making the abortion decision for themselves, and substantial state funds. This Court does defer to many state allocative decisions in social welfare programs, when factors such as the pregnant woman's health and privacy are not involved, as they are here. *See Dandridge v. Williams*, 397 U.S. 471 (1970). But Illinois' action here does not allocate scarce funds among competing uses. Illinois' action costs the state money and thus exacerbates other allocative dilemmas in social welfare programs. Any reason for special deference to certain state welfare classifications is missing.

IV.

A. Illinois provides to all Medicaid recipients all medically necessary services, including physicians' and hospital services, with the exception of medically necessary abortion services. Title XIX of the Social Security Act requires Illinois to provide for the inclusion of "at least" a defined minimum benefit package, in-

cluding hospital and physicians' services, for eligible recipients. 42 U.S.C. § 1396a(a)(13), d(a) (1976). Such services also must be of high quality and provided in a manner consistent with the best interests of recipients. 42 U.S.C. § 1396a(a)(19), (22)(D) (1976). Nothing in the Medicaid statute qualifies the duty to provide medically necessary mandatory services. These provisions make Illinois' exclusion of medically necessary abortions invalid under Title XIX.

The 1972 amendments to the Social Security Act, creating Professional Standards Review Organizations (PSROs), established medical necessity as the Medicaid coverage standard for hospital, physicians' and other services. Act of Oct. 30, 1972, Pub. L. No. 92-603, 86 Stat. 1429 (amended 1977) (codified at 42 U.S.C. § 1320c *et seq.*). The 1972 amendments require PSROs, rather than state Medicaid agencies, to determine whether services are medically necessary and therefore covered by Medicaid, or are unnecessary and therefore uncovered. *Id.* The medical necessity standard is the one which doctors commonly apply, and it is grounded firmly in the Medicaid statute and in this Court's decisions. *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Beal v. Doe*, 432 U.S. 438, 441-42n.3 (1977).

The Medicaid statute and implementing regulations of the Department of Health Education and Welfare (HEW) (*see* 42 C.F.R. § 440.230 (1979)) also prohibit Illinois from denying medically necessary services on the basis of a restrictive standard applied only to recipients suffering from particular conditions. Those provisions of the statute and regulations permitting certain across-the-board limitations on services for fiscal reasons are inapplicable. Illinois' refusal to fund medically necessary abortions is not evenhanded, and it costs the state

money. The Illinois policy subjects women to great damage to their health, and jeopardizes their lives; as such it is antithetical to the purposes of Medicaid.

The effect of the Hyde Amendment aside, HEW has taken the position that states must, under Title XIX, cover medically necessary abortion services. The same conclusion has been reached in twelve federal court rulings, including those of four courts of appeals. That conclusion is compelled by the statute, the legislative history, and HEW regulations.

B. The court of appeals held that the Hyde Amendment was intended to amend Title XIX substantively so as to permit Illinois to deny medically necessary abortion services the Act would otherwise require it to cover. This is erroneous. It has provoked a variety of responses from appellants, none of which supports the court of appeals' position, and none of which is correct.

Nothing on the face of the Hyde Amendment suggests that Congress meant to do anything other than limit federal reimbursement to a state for services Title XIX requires a state to cover as a condition of federal support generally for its Medicaid program. Following the language of the Amendment produces no anomalous result, and recourse to legislative history is thus unnecessary. *TVA v. Hill*, 437 U.S. 153, 184n.29 (1978).

The pattern of disagreement among appellants and the court of appeals demonstrates how precarious it is to try to infer anything from the Hyde Amendment's legislative history. If recourse to legislative history is appropriate, moreover, it supports neither the court of appeals' analysis nor that of any appellant. The root fallacy of the varying arguments that the Hyde Amendment altered the coverage requirements of Title XIX is

that they equate the anti-abortion sentiment of a majority of legislators with a directed intent to take a specific anti-abortion action which neither the measure before them nor legislators speaking on its behalf specifically expressed. This Court should hesitate to ascribe such far-reaching action to Congress' silence respecting any intent to alter a substantive statute when the consequences of that action would damage health in a program intended to promote it.

The United States argues that Medicaid, as a scheme of cooperative federalism, so thoroughly intertwines federal matching funds with requirements imposed on the states that the suspension of federal funds for a particular aspect of the program necessarily, albeit *sub silentio*, suspends the programmatic requirements. The argument that every specific coverage requirement of Title XIX is linked to federal funding for that requirement is, however, false in fact and contrary to HEW's previously consistent position.

While a state's general participation in Medicaid is induced by federal funding in the aggregate, nothing ties each specific service requirement to federal funding. There are many examples—under Medicaid specifically as well as under other programs established under the Social Security Act—of substantive requirements imposed by Congress on the states without federal matching funds. Considered individually and cumulatively these examples foreclose any attempt to distinguish the Hyde Amendment from other federal funding cut-offs that leave programmatic requirements unaffected.

V.

If this Court should reach the question in these appeals of the constitutionality of the Hyde Amendment construed as a substantive amendment of Title XIX, the standards for testing its constitutionality are essentially equivalent to those applicable under the fourteenth amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Since Illinois' action is unconstitutional, the Hyde Amendment would then be unconstitutional as well.

ARGUMENT

I.

THIS COURT HAS APPELLATE JURISDICTION OVER THE PRESENT APPEALS UNDER 28 U.S.C. § 1252 BUT LACKS JURISDICTION TO RESOLVE THE CONSTITUTIONALITY OF THE HYDE AMENDMENT.

A. There Is No Case Or Controversy As To The Constitutionality Of The Hyde Amendment.

Appellees have never sought any injunctive or declaratory relief against the Hyde Amendment. They need no such relief, and no holding on its constitutionality can alter the appellees' rights under the district court's judgment on the constitutionality of the Illinois statute.* Accordingly, this Court has no jurisdiction to

* The Hyde Amendment's constitutionality was injected into the case by the court of appeals, *sua sponte*. See Petition for Cert. 25-26. By virtue of the district court's injunction against Illinois officials, appellees currently enjoy the full relief they seek; the outstanding declaration of unconstitutionality of the Hyde Amendment gives them no additional relief. The issue of the constitutionality of the Hyde Amendment is no more necessary to resolution of this case than it was to resolution of *Maher v. Roe*, 432 U.S. 464 (1977), where it was not mentioned.

decide the Hyde Amendment's constitutionality. See Appellees' Motion to Vacate in Part, Nos. 79-4, 79-5, 79-491 ("Motion to Vacate") at 6-9; see also Conditional Petition for Writ of Certiorari, No. 79-64 ("Petition for Cert.") at 25-26. The United States agrees with this position (U.S. Br. 26-29).

Appellant Miller ("the State" or "Illinois") disagrees, but does so with arguments that have no bearing on the question. He cites the "essential relatedness of the state and federal limitations on abortion funding" (St. Br. 25), referring to (1) appellees' federal statutory claim which turns, in part, on construction of the effect of the Hyde Amendment (*id.* at 21-22); (2) the extent to which the Illinois legislature may have been "aware of, and motivated by" passage of the Hyde Amendment (*id.* at 22); and (3) the asserted identity of the statutes and the constitutional standards by which they are to be judged (*id.* at 23, 23n.10, 25). To establish the requisite case or controversy, however, Illinois must show that there is a concrete dispute between adverse parties with respect to the Hyde Amendment's constitutionality. *Muskrat v. United States*, 219 U.S. 346 (1911). Appellees' federal statutory claim, the motivation of the Illinois legislature in passing P.A. 80-1091, and the asserted parallelism of constitutional issues do not make a legally sufficient dispute on the question of the Hyde Amendment's constitutionality.

The State also relies on *appellants'* motions for summary judgment that the Hyde Amendment is constitutional (R.98, 106, 107), and its own motion to require the United States to reimburse Illinois for all medically necessary abortions.* None of these motions

* This motion, filed after the district court's judgment on the merits, was entered and continued as not ripe for decision (R.124).

shows any dispute about the Hyde Amendment's constitutionality. The grounds on which the State sought reimbursement were that to require the state alone to fund medically necessary abortions would be "inequitable" and violative of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (1976 & Supp.I 1977) ("Title XIX" or "the Medicaid Statute") (A.144), not that the Hyde Amendment was unconstitutional. The United States and Illinois agree that the Hyde Amendment is constitutional. Their agreement dispels any notion that there is an Article III case or controversy about the constitutionality of that provision between those two parties. *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971).

B. This Court Has Jurisdiction To Review The Remainder Of The District Court's Judgment, And It Should Do So.

The district court's judgment of unconstitutionality embraced not only the Hyde Amendment, but Illinois' statutory abortion coverage policy. Both Illinois and the intervenors (though not the United States) appealed the court's ruling that the Illinois policy violates the fourteenth amendment (A.146, 151, 154). No party contests the appellate jurisdiction of this Court over the fourteenth amendment question; and power to review that question is clear. *McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975).

The United States argues, however, that where appellate jurisdiction under 28 U.S.C. § 1252 (1976) is predicated upon a constitutional ruling rendered by a lower federal court without jurisdiction to review the validity of the federal statute in question, this Court should not, in the usual case, proceed to decide the other questions before it in the appeal. This view is without

support in the case law. The United States' argument reflects an admirable desire to further the policy of minimizing the burden of this Court's mandatory docket. In *McLucas v. DeChamplain*, 421 U.S. 21, 32 (1975), however, this Court observed that "in § 1252 Congress unambiguously mandated an exception to this policy in the narrow circumstances the section identifies," and emphasized that "an appeal under § 1252 brings before us, not only the constitutional question, but the whole case" The Court there proceeded to resolve all the substantive questions presented on that appeal, notwithstanding a substantial jurisdictional question about whether the district court had properly addressed the federal constitutional question on which the appeal under section 1252 had been predicated.*

* The United States relies on *FHA v. Darlington*, 352 U.S. 977 (1957), in which a single district judge enjoined a federal statute as unconstitutional. On the United States' appeal, this Court, without reaching the merits, ruled that a three-judge district court should have been convened; it therefore reversed the judgment of the single judge and remanded for further proceedings. 352 U.S. at 977-78. Unlike *Darlington*, however, there is no question here of the district court's jurisdiction over the claims appellees urge this Court to review. More to the point is *United States v. Raines*, 362 U.S. 17 (1960). In *Raines*, the district court held a federal statute unconstitutional. The United States appealed under § 1252, and this Court found that the decision had been "exercised with reference to hypothetical cases," 362 U.S. at 22, so that it was not premised on a justiciable case or controversy. *Id.* at 20-26. This Court then proceeded to review other questions presented as alternative grounds for affirming the district court's ruling, suggesting that the propriety of its doing so turned on whether the district court had "expressed its views" on them, which it had. *Id.* at 27n.7. In this case, of course, the district court not only "expressed its views" on the constitutionality of the Illinois policy, but its decision was almost entirely restricted to analysis of it, rather than of the Hyde Amendment.

The United States in the end urges this Court to address the fourteenth amendment question before it, as well as aspects of the court of appeals' statutory ruling (U.S. Br. 36-38). Whatever the contours of this Court's discretion not to review the questions presented in section 1252 appeals,* the reasons advanced by the United States argue persuasively against the exercise of such discretion here. Indeed, any doubt that this Court should address these additional issues would appear to have been resolved by developments since the United States filed its brief. In *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) 130,155 (E.D.N.Y. Jan. 15, 1980), the district court enjoined the Hyde Amendment as unconstitutional. The Secretary of HEW appealed, and appellees in *McRae* moved this Court to schedule arguments in tandem with arguments in these appeals. In their motion, they urged that only arguments in tandem could assure resolution of the "distinct but interrelated issues posed by federal and state restrictions on medicaid reimbursement for abortion," and "guarantee a comprehensive resolution" of the "abortion funding controversy." Motion to Schedule Arguments in Tandem at 1, 5 (emphasis added). This

* A direct appeal to this Court under § 1252 is the exclusive appellate remedy for all parties when a lower federal court has ruled a federal statute unconstitutional (regardless of what questions they wish to appeal), see 28 U.S.C. §§ 1252, 1291 (1976) and U.S. Br. 27n.14. Accepting this argument of the Solicitor General thus would make this Court an interim forum required to "clean up" such cases before an appeal on the merits. This would entail substantial delay in the ultimate disposition of the issues presented in § 1252 appeals, in circumstances under which the parties are required to bring their appeals to this Court in the first instance and where, as here, all questions may have been fully briefed and argued in this Court. This would, in effect, cause that splitting of appeals which the Solicitor General urges be avoided (U.S. Br. 35).

Court granted that motion. *Harris v. McRae*, No. 79-1268 (Order, February 19, 1980).

II.

THIS COURT LACKS APPELLATE JURISDICTION TO REVIEW THE APPEALS OF ILLINOIS AND THE INTERVENORS ON STATUTORY ISSUES, BUT SHOULD REVIEW STATUTORY CLAIMS WHICH PROVIDE ALTERNATIVE GROUNDS FOR AFFIRMING THE DISTRICT COURT JUDGMENT.

The court of appeals ruled that, under the federal Medicaid statute, Illinois must fund all abortions for which the Hyde Amendment provides federal funding. *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979) ("*Zbaraz II*," at U.S.J.S. App. 74a). The intervenors have purported to invoke 28 U.S.C. § 1252 to secure review of that decision, as well as of the district court judgment (A.148; Intervenor's J.S. 23-25). The State never sought review of any aspect of the court of appeals' decision. Nonetheless it now urges this Court to consider "all . . . statutory questions which were before the Court of Appeals" (St. Br. 31).

Appellees have moved to dismiss the intervenors' appeal insofar as it seeks review of the court of appeals' decision herein, principally on the ground that intervenors never took a timely appeal from that decision—or indeed any appeal at all—within the meaning of the Rules of this Court or of 28 U.S.C. § 2101 (see Motion to Vacate 26-28). Intervenor's argue that the court of appeals' decision was interlocutory and, therefore, this Court, on appeal, can reach back and correct errors in an interlocutory decision (Int. Br. 5). The United States reviews the reasons (previously outlined in our Motion to Vacate 29-30) why the statutory decision intervenors seek to challenge is not included within the

district court judgment (U.S. Br. 39-40). Whether interlocutory or not (*see pp. 35-37 infra*), the court of appeals' judgment on the statutory questions was never merged into the only judgment that intervenors properly appealed: that of a district court for which the court of appeals judgment on such questions was conclusive, and which therefore went on to consider separate legal issues.*

The State's argument supporting its belated** attempt to secure review of the court of appeals decision is equally insubstantial. Illinois relies on a "whole case" argument already addressed in appellee's Motion to Vacate and in the United States' Brief.*** Illinois also refers to

* The cases on which the intervenors rely to support their argument (Int. Br. 5) are therefore inapposite; each confirmed this Court's unquestioned power to review a final judgment of a court of appeals into which is merged an earlier interlocutory decision of that court.

** S. Ct. R. 15(c) provides that "[o]nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." *See Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 386 (1960). Illinois never set forth in its jurisdictional statement any statutory questions.

*** Illinois' reliance on this doctrine is not legitimated by this Court's expansive interpretation of 28 U.S.C. § 1252. Compare St. Br. 29-30. This Court's reading of § 1252 has never even hinted at the proposition that this Court has appellate jurisdiction to review judgments not appealed. *Farmers & Mechanics Nat'l Bank v. Wilkinson*, 266 U.S. 503 (1925), and other cases on which appellees rely (*see* Motion to Vacate 30-33) are not distinguishable because they were decided under jurisdictional provisions allowing for direct appeal in a much broader class of cases than is embraced by 28 U.S.C. § 1252 (*see* St. Br. 29-30). *Farmers & Mechanics Nat'l Bank* and its predecessors were not predicated upon any professed need to limit this Court's appellate docket. The principle governing their disposition was, rather, that review of a court of appeals' decision could not be secured by recourse to jurisdictional provisions which there permitted review only of district court decisions.

the principle of avoiding unnecessary constitutional adjudication (St. Br. 26-27, 30). The concern to avoid constitutional questions is certainly appropriate, but hardly excuses the failure by appellants to invoke this Court's jurisdiction in the proper way (*see* Motion to Vacate 25-33). This Court can avoid constitutional questions only when it has an alternative ground for decision properly before it. A properly filed notice of appeal or petition for certiorari from the court of appeals' decision is a jurisdictional prerequisite for this Court's review of that judgment. Moreover, the State seeks review of statutory issues, which it previously lost, to *enhance* the possibility of this Court's consideration of the constitutional question presented, not to avoid it. There is no jurisdictional basis on which this Court might consider the appellants' appeals on the statutory issues and their attempts to reverse the relief obtained by appellees in the court of appeals.

Despite appellants' failure to appeal statutory issues properly, this Court can and should consider such issues in this case to avoid the fourteenth amendment question presented. The court of appeals held that Title XIX, standing alone, requires coverage of medically necessary abortions, but that the Hyde Amendment alters Title XIX so as largely to relieve the states of that obligation. Whether this Court is to consider the statutory Hyde Amendment issue alone, or both of these statutory issues, turns on resolution of the complex question, not addressed by any appellant, of whether the court of appeals' judgment was final.

If the court of appeals' judgment was not final, then the questions of whether Title XIX, standing alone, requires the states to fund medically necessary abortions and whether the Hyde Amendment relieved them of

that obligation are both properly before the Court as providing an alternative ground for affirming the district court's judgment. It is on this assumption of non-finality that appellees address both of these statutory questions in Section IV, *infra*.

If the court of appeals' judgment was final, it would be *res judicata* and preclude any statutory questions decided by that court from being considered here, except insofar as parties properly sought review of such questions and review is granted. See *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941) (pending appeal does not suspend finality).^{*} The principle of avoiding unnecessary constitutional adjudication, however, could and should still be satisfied in this case by granting appellees' Conditional Petition for Certiorari (No. 79-64), prior to or simultaneously with a decision on the merits, to consider the statutory question presented in the petition (Hyde Amendment's effect on Title XIX). Cf. *Palmer v. United States*, 411 U.S. 389, 396-97 (1973) (granting certiorari as to one of two questions appealed, when appeal has been improvidently taken). Resolution of this question (addressed in Section IV.C, *infra*)

^{*} While the judgment was not *res judicata* as to the United States because it was not yet a party when this case was in the court of appeals, the United States has no standing to litigate the statutory issues. The United States intervened in this case pursuant to 28 U.S.C. § 2403, under which it is "permitted" . . . to intervene . . . for argument on the question of constitutionality, "of the 'Act of Congress . . . drawn in question,' not other questions also presented in the litigation. See *Smolowe v. Delendo Corp.*, 36 F.Supp. 790, 792 (S.D.N.Y. 1940); R.104: p. 1; U.S.J.S. 2; cf. S. Ct. R. 15(c). Moreover, appellees have never sought any relief against the United States on any claims, including the statutory ones. Petition for Cert. 25; Motion to Vacate 6. Therefore the presence of the United States as a party appellant in this Court does not affect the extent to which this Court may address the statutory issues.

favorably to appellees would make a decision on their constitutional claim unnecessary.

The United States at one point appears to assume that the court of appeals judgment was final (U.S. Br. 41, asserting that intervenors could have appealed the court of appeals decision under 28 U.S.C. § 1254 (2), and thus suggesting that that ruling was final. See *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901 (1956); *Slaker v. O'Conner*, 278 U.S. 188 (1929)). The case law does not on balance support, and seems to contradict, that assumption. See *Mathews v. Eldridge*, 424 U.S. 319, 331n.11 (1976); *Catlin v. United States*, 324 U.S. 229, 233 (1945); *Cobbledick v. United States*, 309 U.S. 323, 324 (1940); see also *Corey v. United States*, 375 U.S. 169 (1963); *Hudson Distributors, Inc. v. Lilly & Co.*, 377 U.S. 386, 397-98 (1964) (Harlan, J. dissenting); but see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975).

III.

ILLINOIS' DISCRIMINATION AGAINST WOMEN REQUIRING MEDICALLY NECESSARY ABORTIONS DEPRIVES THOSE WOMEN OF RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Illinois may not, consistently with the state's obligations under the fourteenth amendment, withdraw funding for all medically necessary abortions other than those necessary to preserve the pregnant woman's life, while continuing to fund essentially all other medically necessary procedures under its comprehensive medical assistance programs.* The district court found, on the basis of an unequivocal record, that the Illinois dis-

* The Final Judgment and Order that is the subject of this appeal defines a "medically necessary abortion" as:

an abortion which is necessary for the preservation of the life or the physical or mental health of a woman seeking such treatment, in the professional judgment of a licensed physician in Illinois, exercised in light of all factors relevant to her health.

U.S.J.S. App. 24a. That definition was adopted from *Doe v. Bolton*, 410 U.S. 179, 192 (1973); see also *Colautti v. Franklin*, 439 U.S. 379, 387-88 (1979); *Beal v. Doe*, 432, U.S. 438, 441-42 n.3 (1977). The federal statutory obligation to include medically necessary care generally, without distinction on the basis of diagnosis or condition, is discussed at length at pp. 73-99 *infra*. The State characterizes the Illinois medical assistance programs as "non-comprehensive" (St. Br. 66). The characterization is accurate insofar as Illinois generally excludes care which is not medically necessary (see p. 6 *supra*). The characterization is inaccurate if it is meant to suggest that Illinois in fact excludes medically necessary procedures other than abortion (see pp. 5-6 *supra*). Its treatment of medically necessary abortions aside, if Illinois does exclude a type of medically necessary care from a category of care covered under its Medicaid program, then it is acting in contravention of the Act (see pp. 73-99 *infra*). Illinois' exclusion of medically necessary abortions from coverage is permissible under Title XIX only if the Hyde Amendment implicitly amends the substantive provisions of the Act (see pp. 99-130 *infra*).

crimination subjects a pregnant woman "to considerable risk of severe medical problems, which may even result in her death," and that "the effect of the [Illinois] criteria . . . will be to increase substantially maternal morbidity and mortality among indigent pregnant women.' (U.S.J.S. App. 17a.)*

The Illinois statute came in the wake of this Court's decision in *Maher v. Roe*, 432 U.S. 464 (1977), and appellants throughout this litigation have relied almost exclusively on *Maher* and the companion decision of *Poelker v. Doe*, 432 U.S. 519 (1977), to argue that discrimination with the devastating effects the district court found is constitutional. What appellants consistently brush aside, however, is that the health considerations that are central in this case were missing entirely from *Maher* and *Poelker*. See pp. 44-46 *infra*. The most persistent theme in this Court's abortion decisions has been the primacy of the woman's health. *Roe v. Wade*, 410 U.S. 113 (1973), made clear that an interest in the woman's health is one the state can attempt to further with proper regulation after the first trimester of pregnancy. Indeed, at that point the state's interest in the woman's health becomes "compelling." 410 U.S. at 163. But *Roe* makes clear—and not a word in a single abortion decision of this Court since *Roe* even hints at disagreement—that the state cannot further any other interest when the result will be any significant jeopardy to the pregnant woman's health, let alone her life. *Roe v.*

* Under instruction from the court of appeals, the district court was specifically considering the effects of the Illinois statute as modified by injunction to conform to the standard of the Hyde Amendment then in effect. Since the original Illinois standard is even more restrictive than that of the Hyde Amendment, the district court's findings are fully applicable to the more restrictive standard.

Wade, 410 U.S. 113, 163-65 (1973); see *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 61, 75-79 (1976); *Colautti v. Franklin*, 439 U.S. 379, 387-88, 394, 400 (1979). *Maher* and *Poelker* are not only consistent with this uncompromised theme, but they reaffirm the overriding importance of the woman's health. 432 U.S. at 472.

On the basis of its findings, the district court held that, for the period prior to fetal viability,* the Illinois discrimination violated the fourteenth amendment's equal protection guarantee because it was not rationally related to pursuit of any "legitimate, articulated state purpose" *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). The court specifically found no legitimate state "interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women." (U.S.J.S. App. 18a.)** *Accord, Reproductive*

* Appellees have not appealed from the district court's holding with regard to the very rare post-viability abortions, and hence no issue is posed here with regard to such abortions.

** In following this Court's definitive balance of interests in *Roe*, the district court characterized as illegitimate what this Court had found impermissible. The intervenors object to the district court's terminology (Int. Br. 47), but whatever form of words is used, it is clear that the district court's holding was that Illinois' reckless unconcern with actual maternal life and health is an irrational way to serve any legitimate interest that might be involved. Thus the district court said that "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate." (U.S.J.S. App. 20a.) In similar fashion this Court found in *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978), that a Wisconsin law had adopted irrational means to pursue

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Health Services v. Freeman, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 (8th Cir. Jan. 9, 1980); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405 (D. Conn. Jan. 7, 1980); *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 (E.D.N.Y. Jan. 15, 1980); *Doe v. Percy*, 476 F.Supp. 324 (W.D. Wis. 1979). The district court's decision should be affirmed not only on the ground it employed, but also because the more strict, compelling state interest, standard of review is appropriate here where Illinois has intentionally penalized a woman's exercise of her fundamental rights in making the abortion decision.

A. Illinois' Discrimination Against Women Requiring Medically Necessary Abortions Must Be Subjected To The Compelling State Interest Test.

The first step in application of equal protection analysis here is to decide "whether [[the] state legislation] . . . impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny" *Maher v. Roe*, 432 U.S. 464, 470 (1977). The class of fundamental rights that triggers strict scrutiny is quite limited, but there can be no doubt that the woman's right of privacy in an abortion decision is one of those rights. An interest in procreation was identified as "fundamental" and a "basic liberty" at least as early as *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Griswold v. Connecticut*, 381 U.S. 479 (1965), articulated important constitutional values in insulating childbearing decision-making from most state involvement. In *Roe v. Wade*, 410 U.S. 113 (1973), this

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interests acknowledged to be "legitimate and substantial." See *Craig v. Boren*, 429 U.S. 190 (1976); *Carey v. Population Services Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J. concurring).

Court identified a "fundamental" . . . right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 152-53. Since *Roe*, the Court and individual Justices have repeatedly recurred to the fundamentality of childbearing decision-making, including the decision whether to have an abortion. In addition to the consistent rulings in abortion cases, see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 34n.76 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 640 (1974) ("matters so fundamentally affecting a person as the decision whether to bear or beget a child," quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). *Maier v. Roe*, 432 U.S. 464 (1977), referred to "the fundamental right recognized . . . in [*Roe*]," 432 U.S. at 471. *Roe* was again cited in *Zablocki v. Redhail*, 434 U.S. 374 (1978), to show "a fundamental right to seek an abortion" 434 U.S. at 386. And only last term this Court wrote of a "[fundamental] right of privacy, implicit in the liberty secured by the Fourteenth Amendment, that is 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'" *Colautti v. Franklin*, 439 U.S. 379, 386 (1979). See also *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 531, 536 (1977) (Powell, J. writing for a plurality of four and Stewart, J. dissenting).

The district court rejected applicability of the compelling state interest test, but only because it misapprehended the right asserted. Citing *Maier*, the district court found "no fundamental right to a publicly funded abortion" (U.S.J.S. App. 12a.) Appellees have never claimed any such fundamental right. The fundamental right is in making the abortion decision, not in the receipt of public funds. Once a state undertakes a

program of public spending, however, the general contours of which cover all medically necessary care, it cannot in implementing that program discriminate against exercise of fundamental rights. That is precisely what Illinois has done here.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court found the compelling state interest test applicable because of state discrimination in a welfare program against those exercising the fundamental right of interstate travel. This surely did not amount to recognition of a fundamental right to publicly financed travel. Similarly, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court held that there was no fundamental right to education. But it did so—in the process distinguishing the fundamental right to privacy in the abortion decision, 411 U.S. at 34n.76—only as a preliminary step in determining the level of scrutiny that would be used to test financing discrimination that impinged upon exercise of educational rights. Seldom is there a constitutional right to command public funds. But the equal protection guarantee still forbids discriminatory financing that seriously impinges upon the individual's decision-making with regard to fundamental rights.

In this case, Illinois' general provision of medically necessary procedures defines the discrimination, not the right or interest thereby disfavored. The district court's error in defining the fundamental right at stake seems to have been rooted in a misunderstanding of this Court's discussion of *Shapiro* in *Maier v. Roe*, 432 U.S. 464 (1977). The discussion came in answer to the extreme claim advanced in *Maier*—that the state had an affirmative obligation to finance a woman's exercise of her fundamental privacy right. This Court rejected the analogy to *Shapiro*, saying:

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and [the later case of] *Maricopa County* . . . did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. 432 U.S. at 474-75n.8.

What Illinois has done here is precisely analogous to the state action in *Shapiro* and quite unlike the state action in *Maher*.

In a state without a medical assistance program, a request from a pregnant woman to finance an abortion raises no claim of constitutional right, because a state need not affirmatively subsidize exercise of even the most "fundamental" of rights. It is precisely such a claim that this Court was facing in *Maher* and *Poelker*. The plaintiffs there sought medical assistance funding for purely elective abortions.* But there were no

* Appellants and their amici expend considerable effort arguing that *Poelker* involved a claim for state provision of medically necessary, not elective, abortions (see, e.g., St. Br. 66, 81; Int. Br. 28-30; cf. U.S. Br. 57).

Maher was the principal case on the constitutional issue decided that day, and it characterizes the abortions under discussion as "non-therapeutic" or "elective" no fewer than ten times. It uses contrasting terms like "medically necessary" at least seven times. The same distinction is explicit in the companion case of *Beal v. Doe*, 432 U.S. 438 (1977). *Poelker* was appended to *Maher* and *Beal* with a short *per curiam* opinion.

The history of *Poelker* does reveal ambiguity on the question of medical justification for an abortion for the plaintiff; the court of appeals noted that she did have some medical

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programs of coverage for elective care (see pp. 80-85 *infra*). In the absence of a relevant discrimination, the plaintiffs in *Poelker* and *Maher* had no more claim to state funds for elective abortion than to funds to get them to the polls on election day.

The distinction between elective procedures that the state does not generally fund and medically necessary procedures that the state does fund generally is crucial.*

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problems. *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). But these medical problems were irrelevant to the legal issue as framed by the plaintiff and by the district court. Thus the district court's unreported decision repeatedly characterizes the policy in issue as one that denied abortion "except for medical reasons." Motion To Vacate App. A at 1a.

The certiorari petition in *Poelker* likewise characterized the substantive issue for review as involving a woman's "request for an abortion based on her financial distress within her first trimester of pregnancy where no medical indications exist." Petition for Certiorari 4, in *Poelker v. Doe*, 432 U.S. 519 (1977) (emphasis added). This Court's *per curiam* opinion then meticulously avoided joining any factual dispute about the medical necessity of an abortion for the *Poelker* plaintiff. 432 U.S. at 520n.1. It equated the *Poelker* and *Maher* issues, and characterized the common issue as involving "nontherapeutic abortions." 432 U.S. at 521. As the district court concluded below, this Court in *Poelker* "could not have intended . . . to obliterate the distinction it had carefully drawn in *Maher* between medically necessary and nontherapeutic abortions." U.S.J.S. App. 16a, n.9; see *Doe v. Percy*, 476 F.Supp. 324 (W.D. Wis. 1979); *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 (8th Cir. Jan. 9, 1980).

* In oral argument to this Court, the attorney for the state in *Maher* recognized the crucial distinction between the claims advanced there and here:

We believe that the fallacy of the District Court's reasoning in this case was that Connecticut has no program for funding the medical expenses of pregnancy as such or prenatal or postnatal care. What it does have is

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The *Maier* discussion of *Shapiro* makes this clear in its summation: "We find no support in the right-to-travel cases for the view that Connecticut must show a compelling interest for its decision not to fund *elective* abortions." 432 U.S. at 475n.8 (emphasis added).

Application of the compelling state interest test requires, of course, that the state disfavor or "penalize" exercise of a fundamental right in more than a *de minimis* way. See *Bellotti v. Baird*, 428 U.S. 132, 147, 149-50 (1976). *Maier* found no "penalty" because there was no affirmative state duty to finance abortions and hence no discrimination in the absence of a state program providing elective care generally. *Maier* takes no issue with what *Shapiro* established: discriminatory denial of public assistance funds can act to penalize exercise of a fundamental right.

The most substantial guidance on the nature of "penalties" appears in opinions in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). In *Maricopa County*, Arizona provided emergency medical care to those not satisfying a durational residence requirement, much as Illinois will here provide an abortion if a pregnant woman is in imminent danger of dying without one. But Arizona would not provide medically necessary

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a program to pay for medical expenses which are medically necessary for the patient's health.

* * *

We think there would be validity to the District Court's opinion . . . if abortions which were admittedly medically necessary for the patient's health were excluded from Connecticut's program, which they are not.

95 Kurland & Casper, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 358-59 (1976 Term Supp.).

care except in emergencies to those failing to satisfy a one year residence requirement. Relying on *Shapiro*, *Maricopa County* found an unconstitutional discrimination against those who recently exercised their fundamental right of interstate travel.

The Court's opinion made clear that discriminatory denial of medical care was as much a "penalty" as the similar denial of cash assistance in *Shapiro*:

Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. 415 U.S. at 259.*

Justice Rehnquist dissented, largely on the question of what constituted a "penalty" on exercise of a fundamental right:

It seems to me that the line to be derived from our prior cases is that some financial impositions on interstate travelers have such indirect or inconsequential impact on travel that they simply do not constitute the type of direct purposeful barrier struck down in . . . *Shapiro*.

* * *

[T]he Court should examine . . . whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a

* *Maier* suggested that criminal sanctions would be penalties (432 U.S. at 474n.8), but *Maricopa County*, *Shapiro*, *Maier*, and other decisions make clear that criminal sanctions are not the only burdens triggering strict scrutiny of state infringement of fundamental rights. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Bullock v. Carter*, 405 U.S. 134 (1972).

barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote. 415 U.S. at 284-85.

Justice Rehnquist described this "real and purposeful" standard as "supported by this Court's decisions . . . [and] eminently sensible and workable." *Id.*

Whichever of these two views of "penalties" is accepted, what Illinois has done penalizes a woman's fundamental right in the abortion decision. The Illinois legislature's precise purpose was to prevent as many women as possible from exercising this right (*see pp. 50-53 infra*). The evidence of this purpose is far more substantial than was the evidence in *Shapiro* of a purpose to inhibit travel. And the barrier Illinois imposes is highly effective (*see p. 18 supra*). The women affected are living on an income that Illinois itself defines as subsistence—without any allowance for medical needs. As Justice Stevens said in denying a stay of the injunction, "meaningful exercise of this constitutional right depends on the actual availability of abortions. . . . [I]f the judgment is stayed, the constitutional right to choose will be for many meaningless."* *Williams v. Zbaraz*, 99

* Defendant Miller's predecessor agreed (*see p. 18 supra*). Teen-agers, who will disproportionately require medically necessary abortions (A.35), can be expected to have even less access to funds than older indigent women. For teen-aged Medicaid recipients confined in state mental institutions, *see* 42 U.S.C. § 1396d(a)(16) (1976), alternative access to care would be completely foreclosed. And even if a pregnant woman somehow obtains the money for a private abortion, she will have done so only at the cost of delay. But the "increased danger . . . [from abortion] is measurable from each week to the next" (A.30). Since the state is well aware of all these facts, its refusal to fund medically needed abortions for those it knows to be dependent upon it for medical care amounts to "unnecessary and wanton infliction of pain," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), *quoting Gregg v. Georgia*, 428 U.S. 153 (1976); which is "inconsistent with contemporary standards of decency." *Estelle v. Gamble*, 429 U.S. at 103.

S.Ct. 2095, 2099 (1979); *see Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *Maher v. Roe*, 432 U.S. 464, 474 (1977); *see generally McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9977-78 (slip op. at 57-60) (E.D.N.Y. Jan. 15, 1980). In *Shapiro*, in contrast, there was no determination that denial of welfare actually deterred interstate travel. 394 U.S. at 650 (Warren, C.J. dissenting). *See Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972). Similarly, in *Maricopa County*, "there [was] no evidence . . . that anyone was actually deterred from traveling by the challenged restriction." 415 U.S. at 257.

Appellants' rebuttal of this penalty analysis is mostly a rote invocation of *Maher*, with no recognition that refusal to fund elective abortions is a neutral stance for a state with a medical assistance program not covering elective procedures generally, while refusal to fund medically necessary abortions is not (*see pp. 44-46 supra*). Intervenor adds a misfocused reliance on *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where this Court struck down state laws forbidding, respectively, teaching in a foreign language and sending a child to a private school (Int. Br. 41-42, 66-67). *Maher* relied on these two decisions to support its distinction between "State attempts to impose its will" and state "power to encourage actions." 434 U.S. at 476 (emphasis added). But Illinois is here attempting to impose its will. Despite rationalizations to the contrary, it is not trying to encourage anything (*see pp. 50-53 infra*). As a result *Meyer* and *Pierce* are irrelevant—except as they suggest the poverty of appellants' positions. If Illinois had a scholarship program for study of any foreign language, but made German ineligible, or subsidized chemistry training at all private schools, except Catholic ones, the

actions would be analogous to what the state has done here. And those actions would also clearly constitute unconstitutional penalties. The rights involved here, of course, "are of a far greater degree of significance and personal intimacy than" the rights involved in *Pierce* and *Meyer*. *Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J. concurring).^{*} Thus strict scrutiny must be applied to review Illinois' discrimination against women requiring medically necessary abortions.

B. Illinois' Discrimination Against Indigent Women Requiring Medically Necessary Abortions Is Not Rationally Related To Any Legitimate State Interest, Let Alone Justified By Any Compelling One.

Despite the penalty imposed by Illinois, the state discrimination could still be sustained if shown to support a "compelling state interest." But Illinois' discrimination serves no state interest approaching that level of importance. Indeed, Illinois adopted its devastating restriction of medical assistance funding for medically necessary abortions in pursuit of no legitimate state interest at all. And its action is not a rational way to serve even the legitimate interests that are now advanced as after-the-fact rationalizations for it.

All appellants urge, with somewhat varying language, a legitimate state interest in protection of potential life (U.S. Br. 55; Int. Br. 19; St. Br. 62). This is undeniably a legitimate state interest (albeit never one outweighing the woman's health interest, *see* pp. 53-56 *infra*), but Illinois' actual interest was not in protecting potential life. Illinois passed its restrictive abortion funding

^{*} The analogy would thus be even closer if Illinois provided transportation to the polls for any voter except those wishing to vote for a particular candidate. *Cf. Buckley v. Valeo*, 424 U.S. 1, 293 (1976) (Rehnquist, J. dissenting); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

statute to protect what it perceived, not as potential life, but as actual fully developed human life, a misconception which alone explains the irrationality and cruelty of the Illinois statute.

P.A. 80-1091 contains no statement of purpose, but the Illinois legislature has made clear the attitude motivating all Illinois abortion legislation. In 1975, the legislature passed sweeping abortion legislation declaring:

[T]he General Assembly of the State of Illinois . . . [reaffirms] the long-standing policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception
ILL. REV. STAT. ch.38, § 81-21 (1975).

See also P.A. 81-1078, § 1, ILL. REV. STAT. ch.38, § 81-21 (Supp. 1979). The State acknowledges this as "the policy of the State of Illinois respecting the value it assigns to fetal life" (St. Br. 33).

The legislative history of P.A. 80-1091 similarly reveals equation of a fetus with a human being as the single-minded preoccupation of its proponents. The overwhelming emphasis in the legislative debates was that abortion was equivalent to homicide and thus to be prevented at virtually any cost. As Senator Rhoads characterized the issue:

Either one accepts the premise that the unborn is a human life and therefore the termination of the child is an act of homicide, or one does not accept that premise. I do, and therefore can't vote any other way but yes on the bill (A.59; *see* A.84).

See also remarks of Rep. Leinenweber (A.48, 68); Sen. Rock (A.85); Sen. Lemke (A.64, 88); Rep. Johnson (A.50);

Rep. Pullen (A.52); Rep. Kelly (A.68); Rep. Willer (A.80); Rep. Deuster (A.81, quoted at St. Br. 36); Sen. Knuppel (A.86).

Prevented by *Roe v. Wade* from forbidding abortion outright, the proponents of P.A. 80-1091 adopted the half-way measure they thought available to them— forbidding it to the poor. A remark by Representative Bradley captures the essence of the legislative intent behind P.A. 80-1091. "It's a relatively simple bill It does not prohibit anybody from having an abortion. It prohibits the people who are on welfare from having an abortion" (A.78).

Only when Illinois' action is seen as an effort to protect what the legislature misperceived as actual, not potential, human life does its action become understandable. If a legislature identifies its choice as being between the health of one human being and the life of another, it is at least plausible for it affirmatively to choose the latter. But if a legislature legitimately can equate a fetus with a human being, it would be permissible to prohibit abortion outright, as a simple complement to homicide laws. Since *Roe v. Wade* and numerous subsequent decisions put such action beyond a state's power, they must be understood as holding illegitimate what actually motivated Illinois here. A legislature may not, "by adopting one theory of life, . . . override the rights of the pregnant woman that are at stake." *Roe v. Wade*, 410 U.S. 113, 162 (1973).

Illinois has acknowledged the clash between its motivation and the essential holding of *Roe* and later abortion decisions. The 1975 legislation declares that the "long-standing policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the

mother is impermissible only because of the decisions of the United States Supreme Court. . . ." See St. Br. 33; P.A. 81-1078, § 1, ILL. REV. STAT. ch.38, ¶181-21 (Supp. 1979)).

With the actual motivation for Illinois' discrimination both clear and clearly illegitimate, there is no need to go further and test the state action for its service of fictitious state purposes.* See *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (*per curiam*); *Eisenstadt v. Baird*, 405 U.S. 438, 448, 450 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 79 (1976); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978) (Burger, C.J. concurring).

If an interest in protecting potential life is nonetheless thought to be available to Illinois as a hypothetical justification, that interest is not compelling, nor is the legislation rationally related to such an interest. That potential life is not a compelling interest in the periods before viability of the fetus—the periods involved here—is an essential part of the holding in *Roe v. Wade*, 410 U.S. 113 (1973). It was reiterated only last Term in

* At one point, the intervenors appear to concede both that only "actual" goals can justify legislative action and that a state goal to "chill" the exercise of a decision whether or not to abort is illegitimate (Int. Br. 69). Having effectively conceded the case, they then attempt to resurrect it by simply asserting, without support, that the state had additional "positive purposes" (*id.*). Similarly Illinois appears to concede that it had no actual purpose beyond what it refers to as protection of "fetal life" (see St. Br. 33, 34).

Colautti v. Franklin, 439 U.S. 379, 386 (1979). Even if an interest in potential life were a compelling one for the state—as this Court has held it is after viability of the fetus, *Roe v. Wade*, 410 U.S. at 163 (1973)—it still would not justify the endangerment of a woman's health, let alone her life, that is the direct and intended result of what Illinois has undertaken here. *Roe v. Wade*, 410 U.S. at 164, 165 (1973); *Colautti v. Franklin*, 439 U.S. 379, 387 (1979).* “[T]he State’s interest in potential life is never so great that it can outweigh the woman’s interest in her health” *Williams v. Zbaraz*, 99 S.Ct. 2095, 2098 (Stevens, J. denying stay).

This same conclusion follows even if the standard of review is the more permissive rational basis test. Indeed, because protection of potential life was not Illinois’ actual goal, it is hardly surprising that the legislature

* The fact that Illinois’ precise purpose is to “‘chill’ the exercise” (Int. Br. 69) of a fundamental right, and that its action accomplishes its goal, leads to the conclusion that Illinois is depriving indigent pregnant women of due process as well as equal protection of the laws. Even when a state does not prohibit a protected activity, if its action is “tantamount to a prohibition,” it is “inconsistent with the essential holding of *Roe v. Wade* and . . . cannot stand.” *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J. concurring in part and dissenting in part); see *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 25n.60 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (White, J. concurring); cf. *Geduldig v. Aiello*, 417 U.S. 484, 496 & n.20 (1974). The far less restrictive action in *Maher* may have been similarly motivated (see Perry, *The Abortion Funding Cases: A Comment On the Supreme Court’s Role in American Government*, 66 GEO. L.J. 1191 (1978)), but no evidence of such a purpose approaching the persuasiveness of the present record was even hinted at in the opinion. In addition the price the woman must pay because of the action here—her health and perhaps her life—is very different from the inconvenience or displeasure experienced in *Maher*. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

chose an irrational means to that fictitious end. Only with this insight is it even comprehensible that Illinois is sacrificing a woman’s interest in her privacy, substantial state funds (and hence public welfare needs of these and other recipients) and, most devastatingly, a woman’s health and possibly her life to a purported interest in potential life.

Viewed as a means to protect potential life, Illinois’ action is harsh and reckless in the extreme, as this Court’s decisions essentially have held already. Since *Roe v. Wade*, this Court has repeatedly struck down state attempts to interfere with the woman’s rights in the abortion decision, frequently when her health was involved. Indeed, on the basis of the rationality requirement alone, it has held unconstitutional at least three state restrictions interfering with a woman’s health. *Doe v. Bolton*, 410 U.S. 179, 194, 199 (1973) (hospital accreditation and two doctor concurrence); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 79 (1976) (saline amniocentesis). And only last Term this Court reiterated the paramount importance of the woman’s health in the balance of interests; even after viability, state regulation or prohibition of abortion is permissible “except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman.” *Colautti v. Franklin*, 439 U.S. 379, 387 (1979); see *Williams v. Zbaraz*, 99 S.Ct. 2095, 2098 (1979) (Stevens, J. denying stay).

Appellants can point to no abortion decision of this Court that allows a pregnant woman’s health to be subordinated in any but the most insignificant ways to a legitimate state interest—or even a compelling one. And that includes *Maher v. Roe*, 432 U.S. 464 (1977), where no medical concerns were involved at all. In a program

designed to provide medically necessary care to recipients, Illinois' denial of such care to the women here, damaging their health, is irrational. *See also Reed v. Reed*, 404 U.S. 71, 76 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The lack of any rational relationship to a state interest in potential life is further highlighted by *Mahe*r. Illinois writes of encouraging "childbirth," St. Br. 78 (*see* U.S. Br. 55; Int. Br. 19), *citing Mahe*r v. *Roe*, 432 U.S. 464 (1977). But the state presumably has no interest in the process of birth itself, save in protecting the woman's health during it (*see* p. 39 *supra*). Accordingly, any interest in "childbirth" is but a semantic variation of the other asserted interests in potential life and demographic control.* *See Women's Health Services, Inc. v. Mahe*r, Civ. No. H-79-405, slip op. at 22-23 (D. Conn. Jan. 7, 1980). But in explaining the nature of the state interest in *Mahe*r, this Court referred to "normal childbirth," 432 U.S. at 478, 479 (*citing Beal v. Doe*, 432 U.S. 438, 446 (1977)). This emphasis on normalcy necessarily

* Illinois was not actually motivated by any concern for the future demography of the state, as claimed by the intervenors (Int. Br. 19; *cf.* St. Br. 80; *but see id.* at 62). The only support for such a concern is the possibly facetious remark of one Illinois legislator about future support for his pension (*see* Int. Br. 49). Illinois in fact spends large sums of money each year for family planning services: "Services and supplies for the purpose of family planning are covered regardless of age, sex, or marital status Contraceptive supplies may be dispensed or prescribed or ordered." (St. App. 40a: § A-226; *see* St. Br. 47; *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 at 10,090-91n.20 (8th Cir. Jan. 9, 1980). Illinois even covers *nontherapeutic* sterilization under its medical assistance programs (St. App. 17a: § A-205.2).

qualifies any interest in potential life or demographics of a state acting rationally.

If the state has an interest in "normal" childbirth, it has none in abnormal childbirth and the cruelty resulting from the restrictions Illinois has imposed. There will undoubtedly be additional deaths and complications from abnormal childbirths and from illegal abortions (*see* pp. 8-20 *supra*). Statistical conclusions about "morbidity and mortality" and antiseptically professional terms in which doctors describe the results of refusing medically necessary abortions cannot realistically portray the consequences for pregnant women and girls coerced into furthering the state's alleged preference for "childbirth," "potential life" or "demographics." Medical terminology used to define the results of prolonging abnormal pregnancies refers, in more common parlance, to: juvenile diabetics who become blind; victims of sickle cell crisis (involving unusually painful and widespread blood clots, carrying a risk of kidney failure and heart failure); women with cancer who are forced to choose between continuing chemotherapy treatment (thereby risking massive injury to the fetus) and stopping chemotherapy treatment (thereby risking rapid spread of the cancer); women with uterine tumors attended by severe bleeding into the tumor, partial paralysis, rapidly falling blood pressure and shock; women who suffer from the ordinary "diseases" of poverty—hypertension and malnutrition—developing preeclampsia, potentially resulting in vascular disease, pulmonary edema, kidney and brain damage and stroke. *See generally* A.32-36, 108, 110-11, 117, 125-28; *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9990-92, 9995 (slip op. at 104-10, 119-20) (E.D.N.Y. Jan. 15, 1980). These are forms of "torture or lingering death" that would be

unconstitutional if the state imposed them on convicted felons. See *Gregg v. Georgia*, 428 U.S. 153, 169-71 (1976); *Estelle v. Gamble*, 429 U.S. 97, 101-04 (1976). To impose them on a teenaged girl for the "crimes" of not knowing what contraception is and being raised in indigency, or on an adult for contraceptive failure, perverts the concept of "normal childbirth."

There is nothing "normal" about the coerced childbirths at issue here. This Court has never held childbirth endangering the life or health of a woman to be "normal." Cf. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (repeatedly relying upon the distinction between "normal pregnancy and childbirth" and that involving "medical complications"). "Childbirth is 'abnormal,' . . . when it poses, relative to abortion, a significant threat to the health or life of the mother." *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 at 10,086 (8th Cir. Jan. 9, 1980); see *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 23 (D. Conn. Jan. 7, 1980).

Appellants advance several other interests they claim are served by Illinois' discrimination. Again, none of these actually motivated the state; none of them is a compelling state interest; a number of them are illegitimate, and none is even rationally served by withdrawing funding for medically necessary abortions.

The United States writes of a "desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant" (U.S. Br. 55). The other appellants express the same thought in different words (see Int. Br. 19; St. Br. 77). This is an expression, however, not of a state interest, but of constitutional conclusion.

Any allocative decision could be asserted to reflect taxpayers' moral judgments and any governmental action to represent voters' moral values. But the decisions of this Court do not permit irrational or illegitimate governmental action to be so insulated from constitutional scrutiny. The values that inhere in the Constitution cannot be trivialized in this way. *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Westcott v. Califano*, 99 S.Ct. 2655 (1979); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977).*

Neither Illinois nor the United States relies on any fiscal purpose for the discrimination against women requiring medically necessary abortions (see St. Br. 69, 77, 80). The intervenors persist in their incorrect claim that Illinois has such an interest. Illinois' refusal to fund medically necessary abortions actually costs the state a great deal of money, thus diminishing the benefits available for all groups of recipients. The Illinois legislative debates reflect an awareness of this (see A.64)

* Constitutional rights will belong only to those not dependent on spending programs, if moral judgments beyond the government's power to impose by other means, can be governmentally imposed through spending programs, simply by invoking the name of the taxpayers. The difference between taxpayers as individuals and taxpayers speaking through government is absolutely fundamental to our constitutional system. "[W]hen the choice is made by the government, the obligation to afford all persons equal protection of the law arises." *Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975).

and contain no hint of the illusion that the state might save money.*

For this reason, appellants' reliance upon *Dandridge v. Williams*, 397 U.S. 471 (1970), is perverse. This Court does accord substantial deference to state allocative decisions in social welfare programs in the absence of strong countervailing considerations such as the health of pregnant women or their fundamental privacy rights that are in jeopardy here. But welfare classifications are usually employed for the purpose of allocating limited funds among various groups of recipients. In such cases this Court cannot forbid the disfavoring of one group

* See *Maher v. Roe*, 432 U.S. 464, 478-79 (1977); *Williams v. Zbaraz*, 99 S.Ct. 2095, 2098 (1979); *Zbaraz v. Quern*, 469 F.Supp. 1212 (1979) (U.S.J.S. App. 14a); *Hodgson v. Board of County Comm'rs*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,159 at 10,079n.16 (8th Cir. Jan. 9, 1980); *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 at 10,090n.20 (8th Cir. Jan. 9, 1980); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 23-24 & n.16 (D.Conn. Jan. 7, 1980); *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9970 (slip op. at 31) (E.D.N.Y. Jan. 15, 1980). Intervenor support their argument solely by reference to an article which Judge Blumenfeld recently characterized as "a secondary source that in turn relies largely on foreign studies and questionable conjecture [and] is thus unconvincing" *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 24 (D.Conn. Jan. 7, 1980). Both the district court and the court of appeals understandably paid the argument no heed when it was presented, along with appellees' more detailed rebuttal (R.111: pp.6-9).

In 1978, as the district court found, the average cost to the state of an abortion was less than \$150. In contrast, a child-birth cost more than \$1350 (U.S.J.S. App. 14a, n.8). When indeterminate public support costs for a child are added to the latter figure, the cost saving to the state from each medically necessary abortion is substantial. Using the conservative figure of \$2000 in savings per medically necessary abortion and assuming approximately 10,000 such medically necessary abortions per year (see p. 7 *supra*), the savings in Illinois could amount to \$20,000,000 per year.

without placing the benefits of another group in jeopardy. The Court expressed this concern in *Dandridge* by saying:

[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating *limited* public welfare funds among the myriad of potential recipients. 397 U.S. at 487 (emphasis added).

Since the refusal to fund medically necessary abortions reduces rather than expands the funds available generally for medical assistance, however, it exacerbates the very allocative dilemma that led the Court to its stance of deference in *Dandridge*. Assuming that public assistance funds are limited, the state's action sacrifices not only maternal life, health, and privacy, but the lives and health of other beneficiaries of the public assistance program as well. This Court's decisions have never countenanced such action, under the rationality standard or any other.

The intervenors suggest that the state was pursuing an interest in "protect[ing] itself from abuse and fraud" (Int. Br. 63). Illinois has an interest in preventing fraud by medical practitioners taking part in its medical assistance programs. But concern with Medicaid fraud is not limited to the provision of abortion; doctors have an economic interest in providing any reimbursable service (see Int. Br. 82-83). Both federal and state law provide adequate safeguards against fraud (see App. A, pp. 2a-3a *infra*).^{*} There is no indication that the state

* See also The Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Pub.L.No. 95-142, 91 Stat. 1175 (codified in scattered sections of 42 U.S.C.), strengthening a variety of anti-fraud and abuse provisions generally, and confirming that a state cannot intrude on physicians' decisions as to medical necessity (see pp. 81-85 *infra*).

needed or was pursuing any special concern with fraud in performing abortions. See *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 at 10,080 (8th Cir. Jan. 9, 1980).

The intervenors correctly cite *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969), for the legitimacy of a state purpose of fraud prevention (Int. Br. 63). What they fail to mention is *Shapiro's* rejection of fraud prevention as a justification because it was "unreasonable to accomplish this objective by [a] blunderbuss method" *Shapiro v. Thompson*, 394 U.S. at 637; see, e.g., *United States Department of Agriculture v. Murry*, 413 U.S. 508, 512-14 (1973). It is similarly hard to imagine a more blunderbuss method of preventing a doctor from falsely claiming that an abortion is medically necessary than foreclosing him from performing any medically necessary abortions other than those rare ones necessary to preserve a woman's life. Combined with the overwhelming direct evidence that Illinois' purpose was to stop abortions (see pp. 50-53 *supra*), the conclusion is inescapable that the state was not in fact trying to prevent fraud.

At points the intervenors and the State suggest that Illinois was seeking to prevent not fraud but medically misguided decisions. The intervenors say that some doctors simply "prefer to abort." Int. Br. 75 (emphasis in original); see also St. Br. 44, 55. Both the intervenors and the State unhesitatingly assert now for the first time that abortions are never medically necessary except in life-preserving situations, because, they claim, alternative forms of treatment are available (Int. Br. 72-

75; St. Br. 40-43; see also Amicus Brief of Certain Physicians . . . , *passim*).*

* Quite apart from the inappropriateness of presenting these arguments from "medical literature" (Int. Br. 75) at this point where they cannot be rebutted or subjected to cross-examination in the appropriate fashion, the attempts exhibit both internal inconsistency and a stark lack of touch with reality. Thus the intervenors assert without evidentiary support that there is "mounting evidence that abortion complications—both currently reported and projected—may lead to Medicaid costs greatly in excess of those associated with pregnancy complications" (Int. Br. 58). At other points, however, they rely upon a report of the Center for Disease Control (A.138-42) that showed "[n]o increase in abortion-related complications" in states withholding medical assistance funding for abortions but also showed "no significant difference between institutions in funded and non-funded states in the proportion of Medicaid women with abortion complications . . ." (Int. Br. 12). Intervenors' principal use of this same report (Int. Br. 12, 75) is to quarrel with the district court's finding that Illinois' action will result in a substantial increase in maternal morbidity and mortality. Despite their motion for summary judgment urging "no dispute over facts essential to the outcome of this litigation" (A.101), intervenors rely on the report as "conflicting evidence" that should have led to an "evidentiary hearing" below (Int. Br. 12). The statistics for which the intervenors cite the report, however, deal with a subject irrelevant to the district court's finding, which concerned the effect on women who do not obtain abortions, rather than on those who do. The report provides strong confirmation of the district court's finding: "3 deaths of Medicaid-eligible women [over an eight month period] . . . in states [with restrictions similar to Illinois]: 1 . . . directly related to the absence of public funds; the other 2 . . . indirectly related" (A.138). In addition, it shows that funding restrictions lead to "later gestational age at the time of abortion" which in turn leads to substantial increase in the risks from abortion (see A.139, 141-42); see generally *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 9979-81 (slip op. at 61-67) (E.D.N.Y. Jan. 15, 1980).

Illinois presents an unsupported medical argument that "'deep vein' thrombophlebitis" can always be treated late in pregnancy "when it in fact strikes" (St. Br. 41), without even mentioning the evidence in the record that the danger from abortion itself increases rapidly as pregnancy progresses (see

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The intervenors and the State repeatedly suggest the non-medical necessity of abortions, except those necessary to preserve the life of the mother (see Int. Br. 26-27, 52n.9, 71; St. Br. 68, 76, 78, 82), but the record below has no evidence to support the claim, and an overwhelming body of evidence to the contrary. See

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A.30, 141-42). Intervenor's medical arguments urge "bedrest," "hospitalization," "a change in lifestyle," "[p]roper attention to . . . physical activity, and stress" as at least partial alternatives to abortion for certain conditions (Int. Br. 73-74). But "[t]heoretical alternatives to abortion are not considerations if they are not actually available to the patient. A pregnant woman with varicose veins, for instance, can substantially lower any risk she faces with complete bedrest. This is not an alternative for a woman, such as plaintiff Jane Doe, with small children" (A.130; see also A.36, 107-08).

It is not possible to deal here with all the medical assertions presented now by appellants and their amici for the first time, with no basis in the record. Suffice it to say that most of the authorities cited do not stand for the proposition that abortions in other than life-preserving situations are not medically necessary. Most deal with problems of pregnancy on the assumption that the woman and her doctor have already made the decision to carry the pregnancy to term. See, e.g., ROMNEY, GYNECOLOGY AND OBSTETRICS—THE HEALTH CARE OF WOMEN (1975); WILLIAMS, OBSTETRICS (1976) (cited in St. Br. 39-41); Morrison & Wiser, *The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated With Sick Cell Hemoglobinopathies*, 48 OBSTETRICS AND GYNECOLOGY 516 (1976); Gant et al., *Clinical Management of Pregnancy-Induced Hypertension*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 397 (1978) (cited in Int. Br. 72-73); Blattner et al., *Pregnancy Outcome in Women With Sick Cell Trait*, 238 J.A.M.A. 1342 (1977); Gallus et al., *Prevention of Venous Thrombosis With Small Subcutaneous Doses of Heparin*, 235 J.A.M.A. 1980 (1976) (cited in Amicus Brief of Certain Physicians . . . , 5, 12). Some of the authorities in fact recognize the medical advisability of abortion under non-life threatening circumstances. See Ueland, *Cardiovascular Diseases Complicating Pregnancy*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 429, 433 (1978); Levine & Colea, *When Pregnancy Complicates Chronic Granulocytic Leukemia*, 13 CONTEMPORARY OB/GYN 49 (1979) (cited in Amicus Brief of Certain Physicians . . . , 7, 12).

A.28-37, 38, 40, 89-90, 102-12, 113-21, 123-32, 138-42; see also *Roe v. Wade*, 410 U.S. 113, 121, 127, 139, 142, 153, 164, 165 (1973); *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Beal v. Doe*, 432 U.S. 438, 441-42n.3, 444, 445n.9 (1977). Judge Dooling faced a similar claim of the non-necessity of abortion in *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,155 at 10,045 (slip op. at 308) (E.D.N.Y. Jan. 15, 1980). After an extensive evidentiary hearing, he concluded that:

the abortion procedure is a means of safeguarding the health of the pregnant woman from exposure to serious impairment, and to avert unacceptably high risks of death; . . . the 'life endangerment' . . . standard . . . do[es] not include but exclude[s] the greater part of the cases in which the profession would recommend abortion as medically necessary procedure to safeguard the pregnant woman's health. *Id.*

Similar conclusions have been reached by each court that has addressed the question. See, e.g., *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,160 at 10,080 (8th Cir. Jan. 9, 1980).* The finding below of a substantial "increase . . . [in] maternal morbidity and mortality among indigent pregnant women" was correct.**

* In 1978 Congress passed the Adolescent Pregnancy Prevention and Care Act, finding *inter alia* that "pregnancy . . . among adolescents . . . often results in severe adverse health . . . consequences . . ." Pub. L. No. 95-626, § 601(a)(3), 92 Stat. 3551 (codified in 42 U.S.C. § 300a-21).

** It is not at all clear what the United States means when it says that "The parties did not litigate in the courts below the proper application of the relevant statutory language to one or more particular abortions . . ." (U.S. Br. 59n.30). The record is replete with physicians' judgments on the meaning to them of the statutory phrases (see A.31, 33-34, 109, 110, 119-20, 124-29). The record shows the severe restrictive effect of both the

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More fundamentally, this Court's abortion decisions have already foreclosed the state from overriding the doctor's ethical and medical responsibilities in abortion decision-making. As indicated earlier, those opinions persistently emphasize the central importance of the woman's health in the configuration of interests involved in the abortion decision. A corollary of this solicitude for the pregnant woman's health has been the paramount role of the doctor, and not the state, in making the medical decisions about how to preserve that health. See *Doe v. Bolton*, 410 U.S. 179 (1973); *Singleton v. Wulff*, 428 U.S. 106 (1976).

This Court has twice confronted state regulation purportedly justified, as here, in medical terms. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), a Missouri statute prohibited the use of saline amniocentesis as an abortion technique after the first twelve weeks of pregnancy. This was no absolute prohibition of abortion, for alternative abortion techniques remained permissible. This Court, however, looked behind purported legislative findings of fact and concluded that Missouri's prohibition of the saline method "as a practical matter . . . forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 79. For this reason:

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Illinois and Hyde Amendment standards, which are wholly alien to normal medical judgment (see pp. 9-12 *supra*). It shows that plaintiff Jane Doe had a medical need for an abortion not fundable under either standard (A.89-92). And the district court's findings are that the "set" of withheld abortions is more than "not empty" (U.S. Br. 59n.30); it "may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion." U.S.J.S. App. 21a (emphasis added); see St. Br. 34n.21.

[T]he outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge. *Id.*

In *Colautti v. Franklin*, 439 U.S. 379 (1979), a Pennsylvania statute required that a doctor use an abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother. . . ." 439 U.S. at 389. Despite the explicit reservation of concern for the woman's health, the measure was found unconstitutional in an opinion that repeatedly stressed the necessity for "broad discretion" in the physician. 439 U.S. at 394. Here, of course, Illinois abandons all concern for the woman's health or the normal decision-making process of physicians. The distinction between medically necessary and unnecessary care is firmly grounded in both fact and law. The medical necessity standard is one used in the state's programs generally. That standard permeates the Medicaid statute, which defines the standard by reference to a range of reasonable physician judgment. See 42 U.S.C. § 1320c-5(b)(1) (1976) (*reprinted at p. 7a infra*).

In the final analysis, appellants' constitutional arguments rest almost exclusively on an attempt, through selective culling of language, to identify the present situation with that presented in *Maher*. Once the simple but central distinction between the two cases is acknowledged, however, *Maher* teaches nothing about the rationality of Illinois' action here as a means to

protect potential life, let alone about state justification satisfying a higher standard of scrutiny. Connecticut's refusal to fund in *Maher* was justifiable in a program not covering elective services generally, as an expression of "a value judgment favoring childbirth over abortion, . . . [implemented] by the allocation of public funds." 432 U.S. at 474. Here there is no expression of a value judgment. There is an affirmative attempt to stop abortions, which if allowed will substantially increase mortality and morbidity in the operation of a health care program. See pp. 9-20 *supra*. If what Illinois has done is viewed as expression of a value judgment, however, the expression is accomplished not by a simple allocation of public funds that makes one palatable choice more attractive than another. Rather Illinois has allocated public funds with full understanding that its choice "is not merely unattractive but dangerous" *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 19 (D. Conn. Jan. 7, 1980). "[A]n attempt to persuade by inflicting harm on the listener," however, "is an unacceptable means of conveying a message that is otherwise legitimate." *Carey v. Population Services International*, 431 U.S. 678, 715 (1977) (Stevens, J. concurring); see R. Bennett, "Mere" Rationality In Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1060-69 (1979).

The United States captures the essence of what is at stake here, by persisting in its claim that "Congress [and presumably Illinois] could rationally choose not to fund any abortions under state Medicaid programs" (U.S. Br. 62). This claim is made in the course of depicting the Illinois program restrictions as a mere "policy choice," as if all values were fungible, and as if *Roe v. Wade* and subsequent abortion decisions of this Court did not exist. If the United States is right and actual maternal life,

health and privacy can be sacrificed to potential life, then the constitutional requirement that a rational means be chosen to serve even legitimate ends has lost all meaning. If the rationality requirement retains any content, however, it places Illinois' reckless disregard of maternal life and health beyond legislative authority. Not a single Justice writing in *Roe v. Wade* came to the defense of the sort of rationality judgment the United States apparently champions here. Writing separately in dissent, Justice Rehnquist said that, "If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective" 410 U.S. at 173. And Justice Rehnquist then joined Justice White in intimating that he might have joined the majority if the plaintiff had been claiming a "threat to her mental or physical health." *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J. dissenting).

The uses appellants make of *Maher* and *Poelker* amount essentially to a claim that courts will not review legislative distinctions in social welfare programs, no matter how irrational they are, no matter how unrelated they are to pursuit of legitimate state interests, and no matter what fundamental constitutional rights are thereby disfavored. Both Illinois and the United States, for instance, isolate the following passage from *Maher*: "The Constitution imposes no obligation on the States to pay the pregnancy related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." 432 U.S. at 469; see St. Br. 64; U.S. Br. 51. Their quotations, however, like their arguments, remain incomplete, for these words from *Maher* were immediately followed by their essential equal protection complement: "But when a state decides to alleviate some of the hardships of poverty by providing medical care,

the manner in which it dispenses benefits is subject to constitutional limitations." 432 U.S. at 469-70. *Maier* indeed goes on to quote the rationality standard as formulated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973), itself a case involving public funding: legislation "must . . . be examined to determine whether it rationally furthers some legitimate articulated state purpose and therefore does not constitute an invidious discrimination"

Illinois recognizes the importance of health to its citizens. For fiscal year 1979 it appropriated 1.6 billion dollars for its medical assistance programs for the poor—more than for all its cash assistance programs meeting needs for food, shelter and clothing. IDPA ANNUAL REPORT 1978, at 18 (1979). In P.A. 80-1091 the state singled out a small and powerless group of the medical assistance recipients as the only one to be denied medically necessary care under its medical assistance programs. Those recipients' distinguishing characteristic is the desire to avail themselves of a medical procedure their doctors have told them is necessary to preserve their health and the choice of which is constitutionally protected. If Illinois is allowed to discriminate in this way, the result will be added sickness and added death. Regardless of the standard under which this state discrimination is to be judged, the Constitution does not allow a program intended to further the health of its indigent citizens to be put to such use.

IV.

THE SOCIAL SECURITY ACT REQUIRES ILLINOIS TO COVER MEDICALLY NECESSARY ABORTION SERVICES FOR ELIGIBLE PREGNANT WOMEN; THIS REQUIREMENT IS UNAFFECTED BY THE HYDE AMENDMENT.

A. Introduction.

While Illinois covers all other medically necessary services in its Medicaid program, it excludes almost all medically necessary abortion services from coverage. In *Beal v. Doe*, 432 U.S. 438 (1977), this Court noted that, although a state is free to refuse to fund medically "unnecessary" services, "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage" 432 U.S. at 444-45 (emphasis in the original). The distinction between Pennsylvania's policy in *Beal* and Illinois' policy here is decisive, since the distinction between medically necessary and medically unnecessary services is at the heart of the Medicaid statute and is, in the current context, the only distinction a state may make.

Two groups of persons are eligible for Medicaid. The state is required to extend eligibility to the "categorically needy," a group generally equivalent to recipients of financial assistance (*e.g.*, Aid to Families with Dependent Children, 42 U.S.C. § 601 *et seq.* (1976)). 42 U.S.C. § 1396a(a)(10)(A) (1976); 42 C.F.R. §§ 435.110-.223 (1979). A state can also cover, as Illinois does, the "medically needy" (persons financially ineligible for cash assistance, but whose income is insufficient to meet their medical bills).* 42 U.S.C. § 1396a(a)(10)(C) (1976); 42

* "Medically needy" is thus a Medicaid term of art referring to a certain type of financial eligibility; it does not refer to the need for medically necessary services that all Medicaid recipients share.

C.F.R. §§ 435.300-.325 (1979). Most Medicaid recipients in Illinois are "categorically needy." IDPA, ANNUAL REPORT 1978, at 19 (1979).

Under 42 U.S.C. § 1396a(a)(13)(B) (1976), the state must provide the categorically needy the *mandatory* services specified in 42 U.S.C. § 1396d(a)(1)-(5) (1976, *as amended by* Pub. L. No. 95-210, § 2(a), 91 Stat. 1485 (1977)) including hospital and physicians' services. Coverage of other services listed in § 1396d(a)(6)-(16) (1976) (*e.g.*, dental care, drugs) is optional. The state must provide the medically needy, if covered, with at least the same minimum services listed in 42 U.S.C. § 1396d(a)(1)-(5), or seven of the sixteen categories of services listed in § 1396d(a)(1)-(16). 42 U.S.C. § 1396a(a)(13)(C) (1976). For both groups, Illinois provides all categories of care specified in 42 U.S.C. § 1396d(a) (Medical Assistance Program Rules, St. App. 7a-67a).

A state retains discretion under Medicaid to determine some eligibility groups (*i.e.*, coverage of the medically needy) and some aspects of the package of benefits to which eligible persons are entitled (coverage of optional services, such as dental care or drugs). A state does not have—and Congress has deliberately refused to give to the states—the authority to do what Illinois has done here: exclude medically necessary services by use of a restrictive standard applied to the particular diagnosis or condition of the eligible recipient. It is undisputed that medically necessary abortions would be included in Illinois' coverage of hospital and physicians' services but for P.A. 80-1091. Moreover, the withdrawal of federal funding for almost all medically necessary abortion services under the Hyde Amendment does not alter Illinois' statutory obligation to provide such care.

B. Title XIX Requires Participating States To Cover Medically Necessary Abortion Services.

1. Since the inception of the Medicaid program in 1965, Congress has required that each participating state provide a minimum benefit package for eligible recipients. 42 U.S.C. § 1396a(a)(13)(B) requires, for the categorically needy, "inclusion of at least the care and services" specified in 42 U.S.C. § 1396d(a)(1)-(5); these include inpatient and outpatient hospital services, laboratory and x-ray services, physicians' services, and, as discussed in more detail, *infra*, particular services for children.

Congress considered the inclusion of such a minimum benefit package covering "the most essential" items to be an important advance in meeting the health needs of the poor:

Scope of medical assistance. Under existing laws the State must provide "some institutional and non-institutional care" under the medical assistance for the aged program [the "Kerr-Mills" program.*] There are no minimum benefit requirements at all under the other public assistance vendor medical programs.

The bill would require that by July 1, 1967, [the states cover the mandatory services listed in 42 U.S.C. § 1396d(a)(1)-(5)] Coverage of other items of medical service would be optional with the States.

* * *

In the opinion of your committee, these [required services] are the most essential items of service

* Social Security Amendments of 1960, Pub. L. No. 86-778, Title VI, § 601(b), 74 Stat. 987 (superseded by Title XIX in each state no later than December 31, 1969, Pub. L. No. 89-97, § 121(b), 79 Stat. 286 (1965), repealed by Pub. L. No. 92-603, 86 Stat. 1329 (1972)).

which should be included as a minimum if the medical assistance program is to be of significant help to the individual. These minimum items of service are to become effective July 1, 1967; until then, the State plan must include—as now provided in Titles I and XVI—for some institutional and some non-institutional services.

H.R. REP. NO. 213, 89th Cong., 1st Sess. 9-10, 70 (1965). See also S. REP. NO. 404, 89th Cong., 1st Sess. 9, 80, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1943, 1950-51, 2021.*

As discussed at pp. 80-85 *infra*, Congress later limited care under Medicaid to that which is medically necessary; with that exception, nothing in the language of 42 U.S.C. § 1396a(a)(13)(B) or any other provision of the Act suggests that a state may impose limitations on these mandatory services. Section 1396a(a)(13)(B) requires the “inclusion of at least” these services (emphasis added), not “some” of them, nor indeed “all or part” of them.

Appellants (St. Br. 49, Int. Br. 85) point out that the statute says “the term ‘medical assistance’ means payment of part or all of the cost of the following care and services” 42 U.S.C. § 1396d(a) (emphasis added), and rely on the “part or all” language to confer discretion on the states to include only part of the services.

* Thus, Congress’ intent was exactly contrary to that ascribed to it by Massachusetts and other states in their amicus brief; they argue that the Medicaid Act essentially replicated the discretion the Kerr-Mills program permitted as to services. The provision in 42 U.S.C. § 1396a(a)(13)(A) (1976) for “some institutional and some non-institutional care and services” which these amici rely upon as “particularly significant language” (Mass. Br. at 39-40) is shown by the history quoted in the text to be essentially a transitional provision, superseded by the mandate of the five basic services.

The limitation on payment of “cost” rather than provision of “services” is purposeful, and constitutes a term of art defining the eligibility of the medically needy—those persons whose income and resources may exceed cash welfare standards but “are insufficient to meet all of [the] cost” of medical bills. 42 U.S.C. § 1396d(a). They are required to use income in excess of non-medical subsistence needs to pay part of their medical bills; the state pays the remainder. Thus, depending on the state’s standard and the individual’s income, the state pays “part or all of the cost of” medical care and services.

The history of this language demonstrates that the phrase was tied solely to medically needy eligibility. It originated in the 1960 Kerr-Mills provisions as the device to create a medically needy program for the aged; the pre-Medicaid programs which had no medically needy eligibility had no such language.* But under Kerr-Mills, many states had imposed an objectionable income cut-off point, above which no costs would be paid by the state, and below which all would be. H.R. REP. NO. 213, 89th Cong., 1st Sess. 68 (1965). In 1965 the “part or all” language was retained for Medicaid, and Congress added 42 U.S.C. § 1396a(a)(10)(C) to require, in determining eligibility, flexible consideration of medical costs incurred. *Id.* The House Ways and Means Com-

* Kerr-Mills defined “medical assistance for the aged” as “payment of part or all of the cost of” care and services for aged “persons who are not recipients of [cash benefits].” 42 U.S.C. §§ 306(b), 1385(b) (1970) (repealed 1972). On the other hand, “medical care” for those categories of persons for whom a medically needy program did not exist before 1965 was defined without any such language. 42 U.S.C. § 306 (aged cash recipients); 42 U.S.C. § 606(b) (AFDC recipients); 42 U.S.C. § 1206 (blind recipients); 42 U.S.C. § 1355 (disabled recipients); 42 U.S.C. § 1385 (aged, blind and disabled cash recipients).

mittee explained these provisions, including the language “part or all of the cost” in a section addressing “Determination of need for medical assistance,” not in “Scope and definition of medical services,” discussed later in its Report. It made clear that the language was meant to define the terms of eligibility for the medically needy:

Thus before [a medically needy] individual is found ineligible for all or part of the cost of his medical needs, the State must be sure that the income of the individual has been measured in terms of both the State’s allowance for basic maintenance needs and the cost of the medical care he requires.

Id. (emphasis added). See also S. REP. NO. 404, 89th Cong., 1st Sess. 78-79 (1965), reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1943, 2018-19. Thus the “part or all” language in no way dilutes the state’s obligation to provide all the services in the mandated categories.

Since 1965 other provisions of the Act have required the States to establish standards to “assure” that the care and services provided “are of high quality,” 42 U.S.C. § 1396a(a)(22)(D) (1976), and furnished “in a manner consistent with . . . the best interests of recipients.” 42 U.S.C. § 1396a(a)(19) (1976). The states must thus cover treatment which is effective and currently available (e.g., “high quality,” see p. 94 *infra*).*

The State and the intervenors rely on 42 U.S.C. § 1396a(a)(17) (1976), which has required since 1965 that

* Congress intended the “best interests” language “to provide some assurance that . . . the States will not administer the provision for services in a way which adversely affects the availability or quality of the care to be provided.” S. REP. NO. 404, 89th Cong., 1st Sess. 76, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1943, 2017.

the state establish “reasonable standards . . . for determining [eligibility and] the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].” The legislative history shows that section 1396a(a)(17) does not support what Illinois has done here. Rather, it requires comparable standards for defining eligibility among the groups of persons covered (i.e., the aged, blind, and disabled, and AFDC families). S. REP. NO. 404, 89th Cong., 1st Sess. 77, 79, 81, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 2017, 2018, 2019; H.R. REP. NO. 213, 89th Cong., 1st Sess. 67, 69, 71 (1965); compare *Jefferson v. Hackney*, 406 U.S. 535 (1972). Defining who is “categorically needy” and who is “medically needy” necessarily defines the “extent of medical assistance” provided to persons in each group. S. REP. NO. 404, *supra*; H.R. REP. NO. 213, *supra*. “The extent of assistance” language also governs the terms under which optional services are to be provided. See cases at p. 98n. *infra*. Although we agree with the United States that section 1396a(a)(17) was not intended to affect the state’s obligation to provide mandatory services (U.S. Br. at 43-44n.23), if there is any such effect it is one prohibiting Illinois’ attempt here to exclude particular medically necessary services from coverage on the basis of diagnosis or treatment. See cases cited at p. 98 *infra*.

The preamble to Title XIX has always provided that the purpose of the Medicaid program is to “[enable] each State, as far as practicable under the conditions in such state to furnish (1) medical assistance on behalf of [defined categories of persons] whose income and resources are insufficient to meet the costs of necessary medical services.” 42 U.S.C. § 1396 (1976). Appellants and certain amici assert the preamble vests in the states great discretion as to coverage of medically necessary abortion services. But the enabling language in the

public assistance titles of the Social Security Act has never acted as either a sword for recipients or a shield for the states; it modifies neither minimum eligibility nor minimum assistance provisions.* The Title XIX preamble is only a factor reinforcing state discretion where it otherwise exists, and confirming fiscal practicability as a factor in the exercise of that discretion. Compare *King v. Smith*, 392 U.S. 309 (1968), with *Dandridge v. Williams*, 397 U.S. 471 (1970).

Since its enactment Title XIX has thus required a state to cover all care within the mandatory service categories, and precluded a state from picking and choosing conditions for which it would provide coverage within those categories. Illinois' exclusion of medically necessary abortions is illegal under the Act.

2. Subsequent amendments to Title XIX have retained and reaffirmed the requirement of providing the mandatory services, subject only to an exclusion of medically unnecessary care. Indeed, efforts in 1967 to dilute the mandatory service package for the categorically needy were rejected, since the existing coverage was considered necessary to "make certain that the five basic medical services are provided for the most needy recipients" S. REP. NO. 744, 90th Cong., 1st Sess. 182, reprinted in [1967] U.S. CODE CONG. & AD. NEWS 2834, 3020. Rather, Congress expanded the mandatory service package by adding "early and

* Each Title in the series of public assistance programs opens with the words "for the purpose of . . . enabling each State as far as practicable . . . to furnish assistance. . . ." See e.g., 42 U.S.C. § 601 (AFDC); 42 U.S.C. § 1381 (1970 & Supp. III 1973) (Aid to the Aged, Blind and Disabled).

periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment and other measures to correct or ameliorate defects . . . discovered thereby" Pub. L. No. 90-248, § 302(a), 81 Stat. 905 (1968) (codified at 42 U.S.C. § 1396d(a)(4)(B)). Thus, for women under twenty-one, Illinois is required not only to reimburse all medically necessary mandatory services (including medically necessary abortions), but to assure the provision of such services. See *Stanton v. Bond*, 504 F.2d 1246, 1248 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975); see also HEW MEDICAL ASSISTANCE MANUAL, Pt. 5, § 5-70-00: "Congress intended to require states to take aggressive steps to screen, diagnose and treat children with health problems."

The original Act included a requirement that states make a "showing" of progress in both "broadening the scope of the care and services . . . and . . . liberalizing the eligibility requirements" in the direction of "comprehensive" coverage of all needy persons and all medical services, including optional ones, by 1977. 42 U.S.C. § 1396b(e) (repealed 1972). This comprehensiveness provision anticipated coverage not only of optional services and groups, but of medically unnecessary services as well (e.g., routine check-ups for adults; cosmetic surgery).* See HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, SUPP. D, § D-5142; 118

* Read in conjunction with 42 U.S.C. § 1396's "necessary medical services" language, the comprehensiveness provision may have created some tension in the original statute between medically necessary care and a broader mandate of comprehensiveness. As will be seen, Congress later resolved any such tension, but preserved the mandate of providing medically necessary services.

CONG. REC. 33898-99 (1972) (remarks of Sens. Bennett, Long).

Congress temporarily suspended the comprehensiveness provision in 1969. Act of Aug. 9, 1969, Pub. L. No. 91-56, § 2(a), 83 Stat. 99. In initiating the suspension the Senate Finance Committee responded to states' concerns about "the impact of [comprehensiveness] upon State finances" because of the requirement of progressing towards coverage of all of the medically needy and optional services such as "dental care and eye care." S. REP. NO. 222, 91st Cong., 1st Sess. 5-6, *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 1077, 1081-82. The Committee emphasized that relieving states of the obligation to phase in optional eligibility groups and services was not intended to have any effect on existing mandatory coverage requirements.

The committee wants to make it clear that this amendment in no way affects the obligation of a State to provide at least the five basic services now required under present law for cash assistance recipients.

Id. at 3, *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS at 1079. Congress coupled the comprehensiveness suspension with a limited maintenance of effort provision, imposing preconditions before a state could cut back on some or all of the optional eligibility and optional services it already had extended in response to the comprehensiveness mandate. Pub. L. No. 91-56, § 2(d).

In 1972 Congress permanently repealed the comprehensiveness provision and eliminated the maintenance of effort requirement. Act of Oct. 30, 1972, Pub. L. No. 92-603, § 230, 86 Stat. 1410 (repealing 42 U.S.C. § 1396b(e)). Again, it acted out of a concern for the fiscal impact of phasing in optional groups and ser-

vices, and again it left untouched the state's obligation to provide the mandatory services. S. REP. NO. 1230, 92d Cong., 2d Sess. 202 (1972) (repeal relieves states of financial burden of "expansion of . . . program and liberalization of eligibility"). The maintenance of effort provisions were also repealed because they restricted states in responding to short-term fiscal emergencies and because it would have been inconsistent to require states to maintain expenditures which included medically unnecessary services (due to the prior comprehensiveness requirement and lack of a medical necessity standard) when Congress was simultaneously establishing a definitive medical necessity standard in the same law through creation of Professional Standards Review Organizations ("PSROs"). 118 CONG. REC. 33898-99 (1972) (remarks of Sens. Bennett, Long).

A PSRO is an organization of doctors practicing in a geographic area, certified to monitor utilization, appropriateness and quality of hospital and physician services provided under the state Medicaid programs. 42 U.S.C. § 1320c *et seq.* (1976, *as amended by* Pub. L. No. 95-142, 91 Stat. 1175 (1977)). PSROs are to ensure that "provision of health care and . . . payment for such services will be made—(1) only when, and to the extent, *medically necessary*, as determined in the exercise of reasonable limits of professional discretion" 42 U.S.C. § 1320c (emphasis added).^{*} By July 1, 1974, all states had to recognize the authority of PSROs. 42 U.S.C. § 1320c-13 (1976). Congress intended physicians in PSROs, not state officials, to have the authority to review judgments of medical necessity; the basis was a

^{*} Thus Title XI-B and the 1972 amendments to Title XIX established that states need not cover medically unnecessary services. *See also Beal v. Doe*, 423 U.S. 438 (1977).

firm belief that legislative or administrative intrusions into medical decision-making are disruptive and ill-founded.*

Each PSRO has

[n]otwithstanding any other provision of law . . . the duty and function . . . to assume, at the earliest date practicable, responsibility for the review of the professional activities in such area of physicians and other health care practitioners and institutional and non-institutional providers . . . for the purpose of determining whether—

- (A) such services and items are or were medically necessary; [and]
- (B) the quality of such services meets professionally-recognized standards of health care.

42 U.S.C. § 1320c-4(a)(1) (1976, as amended by Pub. L. No. 95-142, 91 Stat. 1175 (1977)), see also 42 U.S.C.

* [O]nly physicians are, in general, qualified to judge whether services ordered by other physicians are necessary. The committee is aware of increasing instances of criticism directed at the use of insurance company personnel and Government employees in reviewing the medical necessity of services.

S. REP NO. 1230, 92nd Cong., 2d Sess. 256, 258, 260, 264 (1972); see also 118 CONG. REC. 1017, 1019 (1972) (PSROs will determine whether care will be paid under Medicare or Medicaid; government is ill-equipped to perform utilization review) (remarks of Sen. Bennett, PSRO sponsor); *Medicare and Medicaid, Hearings Before Senate Committee on Finance*, Pt. 1, 91st Cong., 2d Sess. 88 (1970) (remarks of John Veneman, Under-Secretary of HEW: "I doubt if we could ever legislate what a doctor should prescribe when he diagnoses the ills of a patient . . . That has to be a medical judgment"); see generally W. Bennett, *Professional Standards Review Organizations-Philosophy and History*, 1975 UTAH L. REV. 355, 356 (PSRO responsibility pre-emptive and "complete"); Gosfield, *Medical Necessity in Medicare and Medicaid: The Implications of Professional Standards Review Organizations*, 51 TEMPLE L. REV. 229 (1978).

§ 1320c-9(a)(1) (1976). The 1972 PSRO statute further requires that the PSROs develop appropriate "norms of care, diagnosis, and treatment" to determine the propriety of medical services. 42 U.S.C. § 1320c-5(a) (1976).

Such norms with respect to treatment for particular illnesses or health conditions shall include . . . the types and extent of the health care services which, taking into account differing, but acceptable, modes of treatment and methods of organizing and delivering care are considered within the range of appropriate diagnosis and treatment of such illness or health condition, consistent with professionally recognized and accepted patterns of care.

42 U.S.C. § 1320c-5(b) (1976).

While states may maintain some parallel "utilization review,"* particularly during transitional periods before full PSRO assumption of such responsibilities (42 U.S.C. § 1320c-2 (1976)), PSRO norms are to be "utilize[d]" by "each other agency or person performing review functions" for Medicaid. 42 U.S.C. § 1320c-5(c)(1), (2) (1976).

Thus, in repealing the comprehensiveness requirement and deleting the interim maintenance of effort provision, Congress relieved the states of the obligation eventually to cover all the optional services (42 U.S.C. § 1396d(a)(6)-(16)) and all the medically needy. In the process it reaffirmed the integrity of the basic service package. The comprehensiveness provision was directed only at the gap between mandatory minimum coverage and comprehensive coverage. The 1972 amendments contemplated fiscal relief for the states by permitting them to continue to exclude, or eliminate previously included,

* See, e.g., 42 U.S.C. § 1396a(a)(26), (30), (31) (1976).

optional eligible persons and services, not by permitting state discretion to limit mandatory services.* (*Compare* St. Br. 47n.25.) The simultaneous passage of PSRO legislation limited the states' obligation under Medicaid to coverage of medically necessary services. The 1972 amendments represented Congress' resolution of the perceived conflict between the needs of the indigent for health care, and the financial limitations on the states. The amendments also resolved any remaining tension between the comprehensiveness mandate and the "necessary medical services" language of 42 U.S.C. § 1396. States were not to cover medically unnecessary care (unless they wanted to do so with their own funds).** The balance that was struck left intact the states' obligation to cover the mandatory services, subject only to the requirement that they be medically necessary.

In 1977 Congress strengthened the PSRO provisions to avoid "disruptive duplicative reviews." H. R. REP. NO. 393 (I), 95th Cong., 1st Sess. 54, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3039, 3056. A PSRO review is "the conclusive determination on" issues of medical necessity "for purposes of payment under this chapter,

* The medically necessary abortion exclusion costs the state money and thereby jeopardizes the provision of other services as well. *See* pp. 59-61 *supra*. But even if excluding medically necessary abortions were cost-saving, this history shows Congress contemplated economic savings by eliminating optional eligibles and/or optional services rather than by eliminating medically necessary care from the mandatory categories, on the basis of diagnosis or condition.

** Where Congress has specifically mandated coverage of services which otherwise might not be medically necessary within the meaning of the Act (*e.g.*, preventive care for children, and non-therapeutic sterilizations as part of family planning, 42 U.S.C. § 1396d(a)(4)), this limitation on the states' obligation does not apply.

and no reviews with respect to those determinations shall be conducted . . . [by] state [Medicaid] agencies." 42 U.S.C. § 1320c-7(c) (1976, *as amended by* Pub. L. No. 95-142, 91 Stat. 1185 (1977)); *see* 42 C.F.R. §§ 463.16(c), 463.27 (1979).*

3. Based on the statutory mandate, HEW has specifically prohibited service restrictions imposed *because* an individual suffers from a particular illness or condition (such as health-endangering pregnancy):

Sufficiency of amount, duration, and scope.

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration and scope to reasonably achieve its purpose.

(c) (1) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 [cross-referencing to mandatory services for the categorically needy and medically needy] to an otherwise eligible recipient *solely because of the diagnosis, type of illness, or condition.*

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

42 C.F.R. § 440.230 (1979) (emphasis added).

* States may challenge a PSRO pattern of review determinations only on the basis of "an unreasonable and detrimental impact on total State expenditures under [Medicaid] and on the appropriateness of care received by individuals. . . ." 42 U.S.C. § 1320c-20(d)(3)(A) (1976, *as amended by* Pub. L. No. 95-142, 91 Stat. 1175 (1977)). Only when both conditions exist "with such regularity that program costs were significantly affected" can the state obtain relief, and then only through the Secretary ruling on the state challenge by suspending the binding effect of PSRO decisions. H.R. REP. NO. 673, 95th Cong., 1st Sess. 42, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3113, 3116; *see Greater New York Hospital Ass'n v. Blum*, 476 F.Supp. 234 (E.D.N.Y. 1979).

The regulatory history parallels the statutory history. Medicaid rules were originally contained in the HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, SUPP. D (1967) ("Handbook"). Relying on 42 U.S.C. § 1396a(a)(4), (10), (13), (17), (19) and (22)(D) (Handbook, § D-5110), HEW provided (*id.* at § D-5140) that:

The medical assistance made available must be sufficient in amount, duration, and scope reasonably to achieve its purpose. A token service which can only be ineffective on the one hand, and wasteful of funds on the other, will not be considered satisfactory.

* * *

Limitations may not be set by eliminating certain groups of patients or certain diagnoses from coverage (emphasis added.)

These Handbook provisions were later superseded by 45 C.F.R. § 249.10(a)(5)(1972). In 1973 HEW issued a proposed revision of 45 C.F.R. § 249.10(a)(5) to "implement certain amendments to Titles XI [PSROs] and XIX [*e.g.*, repeal of comprehensiveness] . . . enacted by Public Law 92-603. . . ." 38 Fed. Reg. 15580 (1973). The proposal included the prohibition against discrimination on the basis of diagnosis or condition but limited that prohibition to discrimination in providing mandatory services. 45 C.F.R. § 249.10(a)(5), 38 Fed. Reg. 15581 (1973). HEW, however, recognized the validity of comments that utilization review and PSRO mechanisms were inconsistent with the proposed total prohibition against limitations based on the diagnosis or type of illness, insofar as medical necessity had become the standard of coverage:

Comments . . . are:

The prohibition against limitation on services based on diagnosis is very good; on the other hand, it may

undercut utilization review. The regulation has been clarified to indicate that the prescription [*sic*, proscription?] relates to arbitrary limitations, not those appropriate to medical necessity or utilization review.

39 Fed. Reg. 16970 (1974). HEW thus added to the final regulation the proviso that "[a]ppropriate limits may be placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures," and modified the proposed prohibition against denial on the basis of diagnosis or condition to provide that the state could not "arbitrarily" deny. 39 Fed. Reg. 16971 (1974). The regulation has remained essentially the same ever since,* and HEW has complemented it by instructing the states: "If a PSRO approves services as medically necessary and appropriate and the State denies payment on grounds of lack of medical necessity . . . a question of substantial compliance with the State plan arises and appropriate HEW action will be taken." *Relationship of PSRO Review Responsibilities to the Medicaid Program*, ACTION TRANSMITTAL SRS-AT-76-141 (Sept. 3, 1976), reprinted in [1976-1977 Transfer Binder] MEDICARE & MEDICAID GUIDE (CCH) ¶27,990.

Illinois argues that 42 C.F.R. § 440.230 applies only to those conditions or services which the state chooses "*ab initio*" (St. Br. 52) to include in its program, a position

* In 1978, as part of a general reorganization of Medicaid regulations, HEW republished the regulation as 42 CFR § 440.230 and deleted the word "arbitrarily," as well as the phrase "such criteria as" before the words "medical necessity or utilization control procedures." 43 Fed. Reg. 45228 (1978). When "commentators expressed concern that these omissions have been construed as a policy change," HEW replaced them, noting "the omission of these phrases was not intended to be a policy change." 43 Fed. Reg. 57253 (1978).

which tortures the regulation and reads out of the statute any requirements at all. The regulation explicitly prohibits the state from choosing *ab initio* to discriminate against services for particular diagnoses or conditions, unless such services are medically unnecessary. See cases cited at p. 98 *infra*.

Illinois and the intervenors assert that Illinois is not discriminating against a condition, but is excluding one treatment (St. Br. 54; Int. Br. 86). In a program providing services for medical needs, however, refusal to meet particular needs of particular individuals comes only through exclusion of services to treat those needs. That is why 42 C.F.R. § 440.230 refers to denial "of a required service" for particular diagnoses or conditions.

Intervenors also argue that the language allowing "appropriate limitations . . . on services based on *such criteria as medical necessity*" (emphasis added) leaves the state free to place limitations on services for a particular diagnosis or treatment based on a more restrictive definition of medical necessity (*e.g.*, life-threatening) (Int. Br. 87). The "such criteria" language thereby is read to nullify the prohibition—set out in the immediately preceding sentence of the regulation—against exclusions based on condition or diagnosis. In addition, it ignores the historical context of the "such criteria as medical necessity" proviso, which was necessitated by the passage of the PSRO statute. The language "such . . . as" indicates limitations based on equivalent grounds,* not qualitatively different ones. It

* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) specifies the following definitions for the adjective "such:"

- 1a: of a kind or character about to be indicated, suggested or exemplified; . . .
- b: having a quality to a degree to be indicated . . .
- 2a: having a quality already or just specified—used to avoid repetition of a descriptive term. . . .

contemplates distinctions between medically necessary services and medically unnecessary services, and only such distinctions. "Medical necessity" review and "utilization control procedures," 42 C.F.R. § 440.230, both define that distinction. See pp. 81-83 *supra*.

HEW has interpreted 42 C.F.R. § 440.230 (and its predecessors) to allow the states to impose durational limits on hospital inpatient care. Handbook, § D-5140. The state and the intervenors see an analogy between HEW's policy and the twenty-one day hospital stay maximum upheld in *Virginia Hospital Association v. Kenley*, 427 F.Supp. 781 (E.D. Va. 1977), and the exclusion of medically necessary abortion services. There is no analogy. HEW's approval of durational limits on such care merely follows the legislative history. Congress explicitly allowed imposition of durational limitations on hospital care, the only type of limitation on mandatory services so contemplated: "the hospital bill shall be paid in full . . . for the number of days covered [by the State program]." H.R. REP. NO. 213, 89th Cong., 1st Sess. 69 (1965); see *id.* at 71; see also S.REP. NO. 404, 89th Cong., 1st Sess., reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1943, 2019. *Virginia Hospital Association*, relying on HEW's interpretation, 427 F.Supp. at 786, carefully distinguished permissible hospital durational limits from impermissible diagnostic limitations on "types of medically indicated" procedures. *Id.* at 785n.2 (emphasis in original). The court found that Virginia's limitation met all or a significant part of the needs of *all* recipients needing inpatient hospital care, regardless of diagnosis, illness or condition. *Id.* at 786.*

* There is no legislative history suggesting that Congress allowed any other type of limitation on coverage of mandatory
(Footnote continued on following page)

As opposed to hospital durational limits, the Illinois policy has no fiscal justification (*see* pp. 59-61 *supra*). It denies medically necessary services based precisely on a recipient's diagnosis, illness or condition, a basis which the statute and 42 C.F.R. § 440.230 prohibit.*

Thus nothing in the legislative history or the regulation supports Illinois' assertion (St. Br. 50) that the frequent references in the statute to "amount, duration and scope" give the state wide latitude in defining those terms for the mandatory services. Except for an irrelevant use of the phrase in 42 U.S.C. § 1396a(a)(2) (1976), every time the phrase appears in the statute it is prefaced by the words "same," "equal" or "shall not be less than," in relation to another eligibility group. Congress thus always used the phrase to define relative coverage between groups (*e.g.*, the medically needy and the categorically needy) and never in the isolated

Footnote continued

services. In this respect, Congress intended the structure of two simultaneously enacted and partially interrelated programs, Medicaid and Medicare (the federal health care insurance program for aged and disabled persons, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395pp (1976 & Supp.I 1977)) to be parallel. Medicare also creates an entitlement to care provided by certain types of providers, so long as the care is "necessary," 42 U.S.C. § 1395y(a) (1976). While Medicare has durational limits, under the heading "Scope of Benefits," 42 U.S.C. § 1395d (1976), that program does not contemplate discriminatory limitations based on diagnosis. "Scope" does not permit exclusions based on diagnosis or condition. *See* 42 C.F.R. § 440.230 ("Amount, duration and scope" of services).

* Illinois, the intervenors and certain amici who rely on durational limits to justify other limits also assume, inconsistently, that states will provide necessary "alternative care" in lieu of medically necessary abortions, even though such "alternative care," if and to the degree effective, requires "prolonged hospitalization," "frequent visits to a physician" and drugs, an optional service. Amicus Brief of Certain Physicians . . . , *passim*; Int. Br. 72-74; St. Br. 41, 54.

context of permitting the state to set the "amount, duration, and scope" of medical services. *See Beal v. Doe*, 432 U.S. 438, 446n.11 (1977).

4. Illinois, the intervenors, and various amici assert that a standard of medical necessity is vague and subject to abuse, and a state may, for that reason alone, use a more restrictive standard.* These assertions are contradicted by the record, and this Court and the lower courts have had no problems with the medical necessity standard for abortions. *E.g.*, *Beal v. Doe*, 432 U.S. 438, 441-42n.3 (1977); *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *United States v. Vuitch*, 402 U.S. 62, 72 (1971); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 16n.12 (D.Conn. Jan. 7, 1980) (vagueness argument is "red herring"); and cases cited at p. 65 *supra*.** The PSRO and utilization review provisions were enacted, in part, precisely to take such judgments about medical necessity away from state administrators. *See* pp. 82-85 *supra*. Medical necessity determinations are to be made on the basis of PSRO norms, and on a case by case basis. In *Association of American Physicians and Surgeons v. Weinberger*, 395 F.Supp. 125 (N.D. Ill. 1975), *aff'd mem.*, 423 U.S. 975 (1976), the court rejected a vagueness attack on the "medically necessary" standard

* *See* St. Br. 15, 40-41, 43-44, 49n.27 ("eludes precise definition"); Int. Br. 22, 76-83 (standard is "loose [and] subject to abuse," "open[s] the door"), and 91 ("elusive"); Amicus Brief of National Right to Life Committee 24-25, 32-33 ("vague and amorphous," "potential for abuse"). Both Amicus Washington Legal Foundation and, arguably, intervenors (Int. Br. 92) predicate their entire legal arguments on this assertion.

** Congress is also comfortable with the standard. The phrase "medical necessity" or medical "need" is used nine times in the PSRO statute (42 U.S.C. § 1320c *et seq.*) and numerous places in Title XIX (*see, e.g.*, 42 U.S.C. §§ 1396a (a)(20), (26)(A), (26)(B), 1396d(h)(1)(B)).

in the PSRO statute. If a PSRO is abusing its responsibility by approving medically unnecessary care, the state's remedy lies with HEW. 42 U.S.C. § 1320c-20(d)(3)(A). Its remedy is not the imposition of a harsh and restrictive standard restricting service for a particular diagnosis or condition, under the guise of preventing abuse in determinations of medical necessity.*

Illinois and the intervenors say, without any support in the record or medical literature (*see pp. 63-64n supra*) that there are always equally effective alternative forms of treatment for all conditions and illnesses otherwise requiring medically necessary abortions.** Even were this true, the statute precludes either states or PSROs from choosing between different but medically acceptable methods of treatment; the PSRO-developed norms which are to be applied under 42 U.S.C. § 1320c-5(a)

with respect to treatment for particular illnesses or health conditions shall include . . . the types and extent of the health care services which, *taking into account differing, but acceptable, modes of treatment and methods of organizing and delivering care are considered within the range of appropriate diagnosis*

* This is not to suggest that any services a physician might deem, under PSRO norms, to be medically necessary must be covered by the state. The state retains the discretion to exclude from coverage *all* optional services. Moreover, the state may retain some discretion to restrict medically necessary services for fiscal reasons by, *e.g.*, the imposition of durational limits on inpatient hospital care or an even-handed, across-the-board restriction on treatment for all conditions (*see p. 98 infra*). But the question of what even-handed restrictions on medically necessary services for fiscal reasons might be permitted a state is not presented in this case; the exclusion of almost all medically necessary abortion services is unique in Illinois' program and is not grounded on fiscal concerns (*see pp. 5-8, 60n supra*).

** *See St. Br. 15, 43-44; Int. Br. 70-76, 91; see also Amicus Brief of Certain Physicians . . . 2 passim.*

and treatment of such illness or health condition, consistent with professionally recognized and accepted patterns of care

42 U.S.C. § 1320c-5(b)(1) (emphasis added).

Illinois and the intervenors also argue that Congress did not intend Title XIX to cover medically necessary abortions because such abortions were illegal in most states in 1965.* *Beal v. Doe*, 432 U.S. 438 (1977), found that a statute whose stated objective was to cover "necessary medical services" could not be held to require coverage of purely elective medical services. This conclusion stood alone based on the face of the statute; it merely was "reinforced" in part by many states' prohibition of elective abortions in 1965. *Id.* at 447. But Congress did not mandate inclusion of any service in the absence of a condition or diagnosis requiring medical treatment.

In contrast, the mandates of the statute and regulations for coverage of medically necessary care cannot be defeated just because in 1965 some states unconstitutionally interfered with women's health. Women requiring medically necessary abortions are suffering from conditions (*e.g.*, sickle cell anemia, retinal eye damage, lung diseases and other conditions described at pp. 13-19 *supra*, complicating pregnancy) which Congress necessarily contemplated covering in 1965; the women had then and they have now conditions necessitating

* In *Beal v. Doe*, 432 U.S. 438 (1977), this Court noted that non-therapeutic abortions were illegal in most states in 1965. Intervenors rely on this reference and the fact that many therapeutic abortions were illegal in many states (Int. Br. 94) to assert that *Beal* thereby redefined "therapeutic." The context in which this Court made its reference, however, dispels any such notion; the Court used the same definitions it has consistently used. *See* 432 U.S. at 441-42n.3, 445n.9.

medical care. In 1965 what may have been for particular women with these conditions the most effective form of *treatment*—an abortion—was illegal in some states. But Congress did not intend the definition of appropriate treatment to be static. At the same time it did intend people with *conditions* for which such care and services were to be provided to have a continuing entitlement to services. Rather than freeze treatment for the poor at 1965 levels, Congress provided in the original Act that development of treatment would be as dynamic as in society at large. 42 U.S.C. § 1396a(a)(22)(D) (“assure that . . . care and services . . . are of high quality”). As this Court said in *Barr v. United States*, 324 U.S. 83, 90 (1945), “[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.”

Congress intended Medicaid to move the poor into the mainstream of modern medicine by providing care (and after 1972 only medically necessary care) their doctors prescribed for their conditions under the current state of the art and the law. Relying on 42 U.S.C. § 1396a(a)(22)(D), HEW noted in the Handbook, § D-5144:

The Congress has made very clear its intent that the medical and remedial care and services made available to recipients under title XIX be of high quality and in nowise inferior to that enjoyed by the rest of the population.

In contrast, Illinois and the intervenors would freeze the right to permissible treatment at 1965 levels, excluding many new surgical techniques (*e.g.*, many forms of heart surgery) and drugs which were unknown or in experimental stages in 1965 but which have since

been approved by the Food and Drug Administration.* There is no support in the statute or legislative history for such a static analysis. Congress has defined the provision of medically necessary services by reference to the general type of care or type of provider (*e.g.*, “physicians’ services”) and the current state of medical science and law. Thus a state must include “physicians’ services furnished by a physician (as defined in section 1395x(r)(1) of this title . . .).” 42 U.S.C. § 1396d(a)(5). The cross-reference is to Medicare, which defines a physician with reference to functions he or she is “legally authorized” to perform. 42 U.S.C. § 1395x(r) (1976).** The statute thus reflects an intent to cover the best quality of treatment permitted by law and provided by science. In *Roe v. Wade*, 410 U.S. at 151-52, this Court pointed out that,

* As early as 1960, in passing Kerr-Mills, it was recognized that treatment would expand. See 106 CONG. REC. 16925 (1960) (cost estimates are difficult since “we do not know what changes will take place in medical science”) (remarks of Sen. Proxmire); see also *id.* at 17210 (remarks of Sen. Yarborough); H.R. REP. NO. 213, 89th Cong., 1st Sess. 66 (1965). HEW has also rejected stasis. For example, when L-Dopa, a drug for Parkinson’s disease, was first approved by the FDA for non-experimental use in 1970, Medicaid and Medicare payments became available for L-Dopa. 3 MEDICARE & MEDICAID GUIDE (CCH) ¶27,201 at 9010-11 (1979). Similarly, HEW requires states to provide transportation to and from medically necessary care. 42 C.F.R. § 431.53 (1979). A combination of legal and scientific developments since 1965 has made such services available to the handicapped. The handicapped’s need for medical services was contemplated in 1965; the improvement in “treatment” of this need is subsumed in the intended response to the need.

** Thus, “physicians’ services” under Medicaid are those “within the scope of practice of medicine or osteopathy under state law.” 42 C.F.R. § 440.50(a) (1979).

originally, the primary purpose of most state laws barring abortions was to protect the health of the pregnant woman in a period during which the state of the art made abortion dangerous. In this case (as opposed to *Beal v. Doe*, 432 U.S. 438 (1977)), abortions are essential for the health of pregnant women. Invalidated state laws, predicated originally on protecting such health, thus hardly support an inference that Congress intended to exclude medically necessary abortions as a treatment methodology for conditions which have always fallen within the statutory compass.*

* Thus no weight should be given to appellants' argument based on Congress' not having expressed a specific intent in 1965 to cover abortions that some state laws barred. (It is equally true that Congress did not then express any intent to exclude abortions that other state laws then permitted.) Congress incorporated a concept of medical need and intended to provide services and treatment to meet such need. This Court has recognized that abortions may often be medically necessary. *Doe v. Bolton*, 410 U.S. 179 (1973); *Beal v. Doe*, 432 U.S. 438 (1977). Since *Roe v. Wade*, 410 U.S. 113 (1973), Congress has amended the Medicaid statute several times (e.g., Act of Dec. 28, 1973, Pub. L. No. 93-233, 87 Stat. 947; Act of Dec. 31, 1975, Pub. L. No. 94-182, 89 Stat. 1051; Act of Oct. 8, 1976, Pub. L. No. 94-460, 90 Stat. 1956; Act of Oct. 18, 1976, Pub. L. No. 94-552, 90 Stat. 2540) without diluting the service coverage provisions of the Act and regulations. The 1977 PSRO amendments reaffirmed the requirement to cover medically necessary services. Any inference drawn from these recent refusals to exclude medically necessary abortions from the substantive requirements of the statute is, to be sure, entitled to limited weight. The inference, however, at worst, is as weighty as the contrary one appellants urge. The applicable factors here are different from those present in *Beal* where no inference could be drawn from Congress' failure to act after 1973 to exclude specific non-therapeutic care from a statute which denied coverage for all such care in any event.

5. HEW has consistently interpreted the Medicaid statute to allow states to exclude elective abortions, but require states to cover medically necessary abortions as defined in *Doe v. Bolton*, 410 U.S. at 192. See U.S. Br. 43-44n.23; *Memorandum for the United States as Amicus Curiae*, in *New York State Department of Social Services v. Klein*, U.S. Sup.Ct. Nos. 72-770 and 72-803 (filed May, 1973) at 5-7; *Memorandum for the United States as Amicus Curiae* in *Beal v. Doe*, U.S. Sup.Ct. No. 75-554 (filed March, 1976) at 5n.*

Similarly, virtually all courts considering the question, including four federal courts of appeals, have held that exclusions of medically necessary abortions violate the Medicaid statute. Some have held that any limitation on medically necessary care within the mandatory services violates the Act: *Doe v. Busbee*, 471 F.Supp. 1326 (N.D. Ga. 1979); *Roe v. Casey*, 464 F.Supp. 487 (E.D. Pa. 1978); *Right to Choose v. Byrne*, 398 A.2d 587 (N.J. Super. 1979).** Others have held that some even-handed, fiscally-based, across-the-board limitations on medically necessary care may well be permissible, but that a restrictive standard applied to

* HEW's failure to disapprove state Medicaid plans which include impermissible abortion limits (Int. Br. 95n.42) is not inconsistent, since it has no significance. See, e.g., *T—H— v. Jones*, 425 F.Supp. 873 (D. Utah 1975), *aff'd mem.*, 425 U.S. 986 (1976); *Smith v. Vowell*, 379 F.Supp. 139, 161 (W.D. Tex. 1974) (court should not make "grave mistake . . . of equating [HEW] inaction with actual approval").

** The courts have applied this same principle to mandatory services in the non-abortion context. See *Rush v. Parham*, 440 F.Supp. 383 (N.D. Ga. 1977); *Smith v. Vowell*, 379 F.Supp. 139 (W.D. Tex. 1974), *aff'd mem.*, 504 F.2d 759 (5th Cir. 1974). See also *American Medical Ass'n v. Weinberger*, 395 F.Supp. 515 (N.D. Ill.), *aff'd*, 522 F.2d 921 (7th Cir. 1975).

medically necessary abortions is illegal because it discriminates on the basis of diagnosis and condition and thereby violates some or all of the following provisions: 42 U.S.C. § 1396a(a)(10)(B), (C)(ii), (17), (19), and 42 C.F.R. § 440.230. *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 124-25 (1st Cir. 1979); *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405, slip op. at 6 (D.Conn. Jan. 7, 1980).^{*} A third group articulates both positions or finds it unnecessary to resolve the issue since a restriction on medically necessary abortions patently violates the Act under either reading. *Hodgson v. Board of County Commissioners*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 30,159 at 10,072 (8th Cir. Jan. 9, 1980); *Reproductive Health Services v. Freeman*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 30,160 at 10,082 (8th Cir. Jan. 9, 1980); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979) (U.S.J.S. App. 42a); *Doe v. Kenley*, 584 F.2d 1362, 1366 (4th Cir. 1978) (*dictum*); *McRae v. Secretary of HEW*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 30,155 at 10,042-43 (slip op. at 296) (E.D. N.Y. Jan. 15, 1980); *Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F.Supp. 529, 537 (S.D. Ohio 1979); *Emma G. v. Edwards*, Civ. No. 77-1342-B, slip op. at 4 (E.D.La. 1978); *Smith v. Ginsberg*, Civ. No. 75-0380 CH, slip op. at 3 (S.D. W.Va. May 9, 1978).

The state and the intervenors rely on two district court cases. *District of Columbia Podiatry Society v. District of Columbia*, 407 F.Supp. 1259 (D.D.C. 1975), involved an optional service and involved no discrimination since the District "permit[ted] physicians to furnish a full range of podiatric care." 407 F.Supp. at 1262-63.

^{*} See also *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977); *Dodson v. Parham*, 427 F.Supp. 97 (N.D. Ga. 1977); *Curtis v. Page*, [1979 Transfer Binder] MEDICARE & MEDICAID GUIDE (CCH) ¶ 29,649 (N.D. Fla. 1979) (invalidating discriminatory exclusions unrelated to medical necessity).

All medically necessary services were covered, regardless of diagnosis or condition. The second case, *D—R— v. Mitchell*, 456 F.Supp. 609 (D.Utah 1978), is a judicial anomaly, upholding Utah's exclusion of medically necessary abortions.^{*} *D—R—* relies heavily on *Beal's* reference to the state's interest in "normal childbirth" for justification. This misconstrues *Beal*. A woman with no medical need for an abortion can be presumed by the state to be capable of going through normal childbirth.^{**} The same cannot be said of a woman with a medical need for an abortion.

Title XIX prohibits precisely what Illinois has done here. Both HEW and the courts have confirmed that Title XIX requires the states to cover medically necessary abortion services.

C. The Hyde Amendment Does Not Impliedly Relieve Illinois Of Its Duty Under The Social Security Act To Cover All Medically Necessary Abortion Services.

The court of appeals held that the FY 1978 Hyde Amendment operated substantively to amend Title XIX so as to permit Illinois to deny medically necessary abortion services the Act would otherwise require it to cover. This holding has provoked an extraordinary variety of responses from appellants, none of whom supports the court of appeals' position.

^{*} The court of appeals subsequently entered an injunction pending appeal requiring Utah to cover medically necessary abortions to the extent of the Hyde Amendment. *D—R— v. Mitchell*, No. 78-1675 (10th Cir. Oct. 25, 1979).

^{**} Again, "normal childbirth" qualifies the state's interest in potential life and demography, interests which in any event are not served by the Medicaid program. Medicaid requires states to cover family planning services, to serve "the best interests of the recipients" (emphasis added), and to provide medically necessary care. See pp. 56-58 *supra*.

Appellees urge that the Hyde Amendment must be read to mean what it says—to affect only the use of federal funds, and not by implication to alter the coverage requirements of Title XIX. Intervenor likewise read the Hyde Amendment not to have affected the coverage requirements of Title XIX; their quarrel with appellees is over the interpretation of Title XIX, which they read to permit states not to fund *any* abortions. Illinois' position appears to be that the Hyde Amendment *forbids* states—on pain of disqualifying their entire state plans—from funding abortions they formerly were free to fund.* And the United States, while purporting “not . . . to disavow the court of appeals’ . . . analysis,” nevertheless questions whether the Hyde Amendment worked a “substantive change” in the Medicaid statute (U.S. Br. 47n.27). The United States asserts that Title XIX implicitly is structured never to require states to cover procedures for which federal financial participation is unavailable.

This bewildering variety of opinions itself provides a powerful argument for appellees' position. Appellants and the court of appeals as well purport to find support for their respective positions in the legislative history of the Hyde Amendment (*see* pp. 106-21, 128-29 *infra*). In combination they dramatically demonstrate how precarious it is to try to infer anything about the effect on an es-

* Appellees understand this to mean that states would be barred from receiving federal money for any part of their Title XIX plans if they fund non-Hyde Amendment abortions. If the State means only that federal funds would be unavailable for non-Hyde Amendment medically necessary abortions, then its position on the effect of the Hyde Amendment is identical to that of appellees. But the State argues that the Hyde Amendment did work a substantive change in Title XIX by eliminating pre-existing discretion to cover abortions (St. Br. 56-58), so that it must intend the more far-reaching position.

tablished and complex substantive statute from heated and unfocused debates on appropriations for an isolated corner of that statute.

The successive Hyde Amendments* say only that “none of the funds provided [for] in the [HEW appropriations] Act[s] shall be used” for medically necessary abortions, except in extremely narrow circumstances. The Amendment includes no reference to Title XIX, much less to the services Title XIX requires states to provide as a condition of participation in the Medicaid program. Nothing on the face of the statutes suggests that Congress meant to do anything other than limit federal reimbursement for services Title XIX otherwise requires a state to cover as a condition of federal support generally for its Medicaid program. The “most persuasive evidence” of Congress' intent in enacting the Hyde Amendment—the “words by which . . . [it] undertook to give expression to its wishes,” *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1939), provides no support for the conclusions that the Hyde Amendment was meant impliedly to repeal the substantive coverage requirements of Title XIX or to dovetail with some existing understanding

* The FY 1980 Hyde Amendment now in force differs from the previous provisions, including the one the court of appeals had before it (*see* U.S. Br. 50-51) but not in any way that affects the present analysis, except insofar as the constant change in provisions suggests the mischief in holding annual appropriations legislation recurrently to change substantive provisions of a statute imposing obligations on a state. *See Hodgson v. Board of County Comm'rs*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,159 at 10,078 (8th Cir. Jan. 9, 1980) (McManus, J. dissenting); *D.C. Federation of Civic Ass'ns v. Airis*, 391 F.2d 478, 482 (D.C. Cir. 1968). No party suggests that Congress' intent in passing the successive amendments has differed from year to year so as to require any varying analyses of their impact.

that federal funding limitations modify Title XIX. Accordingly, the appellants' and court of appeals' conclusions to this effect are all predicated on an argument that Congress expressed its will by implication. See pp. 121-122, 124 *infra*.

In *TVA v. Hill*, 437 U.S. 153 (1978), this Court recently rejected a strikingly similar argument. *TVA* held that an appropriations provision for completion of a public works project threatening the habitat of an endangered species did not amend a substantive statute protecting that habitat. The decision reaffirmed and applied three longstanding principles of statutory construction. The first is that "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Id.* at 187n.33. The second is a "cardinal rule" that an "intention of the legislature to repeal [a statutory provision] must be clear and manifest," *id.* at 189; "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* at 190. The third is that this "cardinal rule . . . applies with even greater force when the claimed repeal rests solely on an Appropriations Act." *Id.* at 190.* See also *United States v. Langston*, 118 U.S. 389, 393 (1886) ("If by any reasonable construction they [the pre-existing substantive legislation and the appropriations rider] can be made to stand together our duty is to give effect to the provisions of each").

* A fourth principle, not present in *TVA* but present here, is that courts should, if possible, construe a statute in a way which will avoid the constitutional question otherwise presented. *Ashwander v. TVA*, 297 U.S. 288, 348 (1935) (Brandeis, J. dissenting in part). See *Doe v. Mathews*, 422 F.Supp. 141, 147 (D.D.C. 1976) (applying avoidance doctrine to interpretation of the Hyde Amendment).

The court of appeals avoided the fact that the Hyde Amendment and Title XIX are not irreconcilable; and no appellant argues for irreconcilability. Appellants seek instead to establish from the legislative history of the Hyde Amendment Congress' "clear and manifest" intent impliedly to repeal.

Initially, however, there should be no occasion to consult those debates at all. The language of the Hyde Amendment is clear, and "[w]hen confronted with a statute which is plain and unambiguous on its face," this Court does not "ordinarily . . . look to legislative history as a guide to its meaning." *TVA v. Hill*, 437 U.S. 153, 184 (1978).

The court of appeals' reasons for departing from this rule are unpersuasive. Initially it asserted that state obligations under Title XIX are "not all . . . clearly spelled out in that statute" *Zbaraz II*, U.S.J.S. App. 45a. The only sense in which this is true, however, is that Title XIX often imposes obligations on states in general terms and through the interaction of different provisions of a complex statute. But generality in statutory requirements (such as Title XIX or the Endangered Species Act) is a commonplace, so that reliance on that factor would undercut the very rule the court of appeals recognized as entitled to respect. The complexity of the Medicaid statute merely reinforces the arguments for avoiding disruptive interference with the statutory scheme by legislative action that is not focused on that very complexity. The court of appeals itself conceded that its approach "enhances the likelihood of confusing and disruptive annual changes" *Id.* at 44a.

The court of appeals also regarded it as significant that "these obligations arise in the context of a plan for sharing expenses between federal and state

governments.” U.S.J.S. App. 45a. The suggestion, apparently, was that for Congress not to repeal the requirement that the states fund all medically necessary abortions, when it provides no matching funds for all these abortions, is so “absurd” a result that review of the legislative history is justified to determine if Congress really intended that result. See *TVA v. Hill*, 437 U.S. 153, 184n.29 (1978). As discussed at pp. 123-28 *infra*, however, the reality is that funding formulas in federal-state cooperative programs, including the Medicaid program, often fail to track substantive obligations; and giving the Hyde Amendment the meaning its words express produces a result that is supported by precedent and logic, and is even to be expected, given the realities of the legislative process.

If it is nonetheless appropriate to look at the legislative history of the Hyde Amendments to ascertain the reach of those provisions, none of the appellants finds in them the necessary support. Nor does that history support the court of appeals.

Normally this Court relies on committee and conference reports, which derive from legislators with responsibility for the legislation, as authoritative statements of legislative intent. These reports are available to all legislators when voting on a bill, and often serve to guide and focus debate.

There are no committee or conference reports bearing on the question here. There are, indeed, only two collective expressions of legislators’ intent. One is a “Joint Explanatory Statement of the Committee of Conference” on the FY 1977 HEW Appropriations bill. The brief state-

ment, paralleling the language of the Hyde Amendment itself, supports appellees.*

The second collective statement came in response to HEW’s promulgation of regulations as required by the FY 1978 Hyde Amendment, which instructed HEW to issue regulations insuring that the provision be “rigorously enforced.” Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977). The responsive regulations, by their express terms, address only the issue of “Federal financial participation” 43 Fed. Reg. 4570 (Feb. 2, 1978). After the promulgation of the regulations, fifty Congressmen who had supported the Hyde Amendment, including Rep. Hyde, wrote a letter to the Secretary of HEW (124 CONG. REC. S18439-40 (daily ed. Oct. 12, 1978)), stating that “the purpose of this resolution [the Hyde Amendment] is to limit HEW funding for abortions” (*id.* at S18439) and criticizing the regulations for “violat[ing] the intent, purpose and spirit of the law.” *Id.* That letter detailed the many respects in which the signatories

* Section 209 of the House bill contained a prohibition against the use of funds contained in this Act to pay for or to promote or encourage abortions. The Senate bill deleted this provision.

Having met in further conference, agreement has been reached on the issue of whether or not Federal funds may be used to finance abortions. Most certainly, this is a difficult, emotionally-charged issue—one which many believe should be dealt with by the appropriate legislative committees.

* * *

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience.

H.R. REP. NO. 1555, 94th Cong., 2d Sess. 3 (1976).

believed the Secretary had not faithfully enforced the provisions of the rider; the signatories wrote that he had not promulgated "tight regulations that would have effectively limited federal funding to abortions that actually fit within the stipulations of the law as intended by Congress." *Id.* at S18440. But nowhere is there any criticism of the Secretary's failure to enforce the Amendment by a statement in the regulations that it was intended to alter a state's obligation to cover most medically necessary abortions.

The court of appeals' holding is not based on any collective legislative expression. It is based solely on the floor debates, which this Court consistently has recognized are of limited usefulness. "In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws." *S & E Contractors v. United States*, 406 U.S. 1, 13n.9 (1972); see *Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F.Supp. 529, 539 (S.D. Ohio 1979).

The court of appeals purported to find from the debates that the "overwhelming weight of the legislative history" supported its conclusion of a substantive change. U.S.J.S. App. 49a. Others have found the debates far less clear. The introductory comments to the HEW regulations concluded that the debates were "inconsistent or inconclusive" and lacked any "official expression of even one House of Congress as to the meaning of this statute." 43 Fed. Reg. 4833 (Feb. 2, 1978). In February, 1978, in a letter written to HEW Secretary Califano, Attorney General Bell noted the difficulty in interpreting the Hyde Amendment: "for the most part, neither the language of the section nor its

legislative history provides clear answers." *Departments of Labor and HEW Appropriations for 1979: Hearings before the Subcommittee on the Departments of Labor and HEW of the House Committee on Appropriations*, 95th Cong., 2d Sess., Pt. 2, at 70 (Feb. 21, 1978) (statement of Joseph A. Califano). Secretary Califano stated before a House appropriations subcommittee that HEW's interpretation of the Hyde Amendment was difficult because there was "lots of difficulty, language not clear, lots of contradictory elements in the debate itself." *Id.* at 174.

In fact, the court of appeals' conclusion of implied repeal could only have been reached "through strained process of deduction from excerpts of wholly ambiguous significance, . . . furnish[ing] dubious bases for inference in every direction." *Gemsco v. Walling*, 324 U.S. 244, 260 (1944). Neither that court nor any appellant cites a single comment specifically expressing an intention to repeal the requirement that states cover medically necessary abortions. In fact there is one such unambiguous statement—and apparently only one—in the several hundred pages of debates. Rep. Russo said in the FY 1978 debates that under the Hyde Amendment, states would have the option of paying for abortions, but the withdrawal of federal funding would encourage them to discontinue abortion coverage, "an option States cannot exercise at the present time." 123 CONG. REC. H6097-98 (daily ed. June 17, 1977). This remark, standing alone, hardly meets the TVA test; rather it demonstrates that it was possible for legislators to articulate such an intent—and with this exception they apparently did not.

In contrast, the debates contain a great deal that supports precisely the conclusion that the language of the Amendment suggests. Most members of Congress par-

ticipating in the debates, including all the most prominent supporters of the successive Amendments, repeatedly and from the outset described the Hyde Amendment as being intended to restrict federal funding for abortions. Representative Hyde himself, in debates over the FY 1977 rider, stated that he "intended to prevent the use of Federal funds to pay for abortions except to save the life of the mother. I offer this as a clear statement of legislative intent." 122 CONG. REC. 30897 (1976).*

Rep. Bauman led the fight in the House for adoption of the riders. Speaking in support of the FY 1977 Amendment, he stated that it would "simply prevent the use of taxpayers' funds to finance and promote abortion." 122 CONG. REC. 26789 (1976).** Rep. Flood, floor

* Rep. Hyde referred to the Hyde Amendment in the same terms on several occasions: "We . . . seek to inhibit the use of Federal funds to pay for and thus encourage abortion . . ." 122 CONG. REC. 20410 (1976); "[t]he position [the House] has adopted . . . is that Federal money shall not go to pay for the taking of innocently inconvenient life The position is that no Federal funds go to pay for abortion," 123 CONG. REC. H10830 (daily ed. Oct. 12, 1977); compromise provision unacceptable because it "result[s] in Federal funding of some abortions, and this is a position that I must resist and that I cannot accede to," 125 CONG. REC. H9885 (daily ed. Oct. 30, 1979).

** Rep. Bauman and other supporters often expressed their understanding of Congress' intent as the prohibition of "public" funds or "tax" dollars for abortions, without specifying whether they were referring to federal or state moneys. See, e.g., 122 CONG. REC. 20411 (1976) ("prohibit the use of tax dollars for the payment for the performance of abortions") (Rep. Kindness); 123 CONG. REC. H6090 (daily ed. June 17, 1977) ("We can constitutionally prohibit the use of tax dollars to promote and perform abortions") (Rep. Volkmer); *id.* at H6096 ("Hyde Amendment . . . forbid[s] funding for all abortions under Medicaid") (Rep. Oakar); *id.* at H8348 (daily ed. Aug. 2, 1977) ("prohibits the use of any funds for abortions except to save the life of the mother") (Rep. Hyde); 125 CONG. REC. H5254 (daily ed. June 27, 1979) ("[the] bill . . . only says the taxpayers money will not be used [for abortions]") (Rep. Volkmer). None of these legislators ever suggested that Congress constitutionally could "prohibit" the states from funding abortions with their own "tax" dollars. Thus, when these legislators suggested that the Hyde Amendment was intended to "prohibit" "tax" funding of most abortions, they most reasonably are understood as referring to the federal government and the federal tax dollars that were their legislative business.

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manager of the conference report on the FY 1978 Labor-HEW appropriations bill, expressed his understanding of the debates as involving the "issue of Federal funds for abortions." 123 CONG. REC. H10866, H10829 (daily ed. Oct. 12, 1977); see also 122 CONG. REC. 30895 (1976). Rep. Rudd, a consistent supporter, stated in debates over the FY 1980 rider that "the question before us today, as on so many previous occasions, is that of the appropriate extent of Federal funding for abortions." 125 CONG. REC. H5261 (daily ed. June 27, 1979).

In the Senate, Senators Helms, Hatch and Bartlett were among the most prominent spokesmen for passage of the Amendments, and Sen. Brooke was their most prominent opponent. Sen. Helms characterized the FY 1979 rider as a "decision to restrict the use of Federal funds for abortion . . .," 125 CONG. REC. S9853 (daily ed. July 19, 1979), and "an agreement between the Senate and the House that Federal funding of abortions should be strictly limited . . ." 124 CONG. REC. S18443 (daily ed. Oct. 12, 1978). He objected to a less restrictive version as "mandat[ing] the expenditure of Federal taxpayers' money to pay for the performance of abortions . . ." 123 CONG. REC. S18584 (daily ed. Nov. 3, 1977). During passage of the FY 1977 Hyde Amendment he stated, "The intent of this provision is clear. It is to restrict the

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cept to save the life of the mother") (Rep. Hyde); 125 CONG. REC. H5254 (daily ed. June 27, 1979) ("[the] bill . . . only says the taxpayers money will not be used [for abortions]") (Rep. Volkmer). None of these legislators ever suggested that Congress constitutionally could "prohibit" the states from funding abortions with their own "tax" dollars. Thus, when these legislators suggested that the Hyde Amendment was intended to "prohibit" "tax" funding of most abortions, they most reasonably are understood as referring to the federal government and the federal tax dollars that were their legislative business.

use of Federal money for abortion." 122 CONG. REC. 30996 (1976). Sen. Hatch, speaking in favor of the FY 1980 rider, said that the Congressional supporters of the rider were a "bipartisan majority—[which] opposes Federal funding of abortion." 125 CONG. REC. S9853 (daily ed. July 19, 1979). Their fight, he stated, had been "waged in opposition to Federal funding of abortions." *Id.* Sen. Bartlett said that "the purpose of the [FY 1978] amendment is very clear, to stop the Federal financing of abortions." 123 CONG. REC. S10803 (daily ed. June 27, 1977). Sen. Brooke said that the FY 1977 rider "rule[d] out all abortions at Federal expense. That is what the Hyde Amendment intended to do and that is exactly what it does." 122 CONG. REC. 27764 (1976).

The court of appeals dismissed this legislative history by saying that only "a few Congressmen and Senators said that the amendment would simply restrict federal funds for abortions." *Zbaraz II*, U.S.J.S. App. 45a. In fact, the remarks quoted above are only a small sample of remarks in the same vein.*

* See, e.g., 122 CONG. REC. 30896 (1976) ("Hyde Amendment . . . as passed by this House prohibited the use of Federal funds for abortion") (Rep. Conte); *id.* at 30899 ("Make no mistake about it, this language makes the intent of Congress very clear. We are not going to permit the Federal Government and its taxpayers to support wholesale murder") (Rep. Bauman); *id.* at 27673 ("Specifically the question is one whether we should permit Federal funds through the Medicaid program to be utilized by women who need or require abortions") (Sen. Bayh); *id.* at 26786 ("we must decide whether . . . to support Mr. Hyde's proposal to prohibit Federal tax dollars from being used to promote or perform abortion") (Rep. Paul); *id.* at 20885 (the question is whether there is "an affirmative duty on the part of the Federal Government to use public funds to finance the termination of human life") (Sen. Helms); *id.* at 33868 (Hyde Amendment is "unconscionable limitation on the use of Federal funds for abortions") (Sen. Packwood); 123 CONG. REC. H6090 (daily ed.

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June 17, 1977) ("Once again the Congress must make a decision on the Federal funding of abortions") (Rep. O'Brien); *id.* ("the only thing that we can address ourselves to in this body, and the only thing over which we have any control, is what we do with Federal dollars. That is why this question centers on the area that it does") (Rep. Edwards); *id.* at S10177-78 (daily ed. June 20, 1977) ("it is morally wrong to use Federal tax dollars for having abortions performed on demand. There is just no justification for the Federal Government to pay for such abortions I believe that the prohibition against using Federal funds for abortions which we included in the appropriations bill last year should also be included in the fiscal year 1978 appropriations bill") (Sen. Stennis); see also *id.* at S11039-40 (daily ed. June 29, 1977) (Sen. Stennis); *id.* at S11039 ("The question now before the Congress, the so-called Hyde Amendment is whether or not Federal funds may be used in welfare cases to pay abortion-related costs in certain circumstances") (Sen. Bellmon); *id.* at H10134 (daily ed. Sept. 27, 1977) ("In two separate Congresses, in 1976 and 1977, the House has cleaved to the language of the Hyde Amendment which prohibits the Federal funding of abortions unless it is to save the life of the mother") (Rep. Dornan); *id.* at H12174 (daily ed. Nov. 3, 1977) ("The debate [is] on the question of Federal funds for abortion") (Rep. Neal); *id.* at S18589 (daily ed. Nov. 3, 1977) ("I will no longer be able to support my colleagues in their efforts to find a provision restricting Federal funds for abortions which will be acceptable to the House When the issue first arose this year, I took the strong position that the Federal Government should provide funds for all medicaid abortions") (Sen. Packwood); *id.* at S18791 (daily ed. Nov. 4, 1977) ("For those who are totally opposed to Federal funding for abortions, and those who feel that there should be far more Federal funding for abortions, it [FY 1977 compromise version of Hyde Amendment] is not really totally acceptable to either side") (Sen. Leahy); 124 CONG. REC. H5358 (daily ed. June 13, 1978) ("throughout the prolonged debate on this issue of whether or not Federal taxpayers' money should be spent to finance abortions, on no occasion has the House . . . ever adopted a proposition similar . . . that we have no restrictions whatever on Federal funding of abortions") (Rep. Bauman); *id.* at H5360 ("I support the Hyde Amendment prohibiting the use of Federal taxpayer dollars to perform abortions. . . . [W]e [must] do everything in our power to stop the use of Federal dollars to perform abortions") (Rep. Rudd); 125 CONG. REC. H5213 (daily ed. June 27, 1979) ("this [proposed procedural rule] is an effort to save time and at the

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These remarks, both in bulk and in the authority of the speakers, reinforce the interpretation the words of the Hyde Amendment alone would lead to.* In contrast,

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same time to be fair to all parties in the House, those who support Federal funding of abortions and those who oppose it, as I do") (Rep. Bauman); *id.* at H5257 ("we should point out that we are not asking the question whether or not abortion should be permitted under the enumerated circumstances. The question we are being asked to vote on is whether or not we should provide Federal funds for and thereby endorse abortion under these circumstances") (Rep. Tauke); *id.* at H8762 (daily ed. Sept. 28, 1979) ("we firmly stood by the House position, which restricts the use of Federal funds for abortion except where the life of the mother would be endangered if the fetus were carried to term") (Rep. Whitten); *see also id.* at H8855 (daily ed. Oct. 9, 1979) (Rep. Whitten); *id.* at H10955 (daily ed. Nov. 16, 1979) (Rep. Whitten); *id.* at H9884-85 (daily ed. Oct. 30, 1979) ("because it would prohibit the use of any Federal funds to perform abortions except where the life of the mother is endangered or where rape or incest has occurred, I believe it is language that the House could embrace . . .") (Rep. Wright); *id.* at H10959 (daily ed. Nov. 16, 1979) ("we began this whole dialogue on the issue of abortion as a result of our finding out there were a considerable number of abortions being funded by the Federal Government. Those of us opposed to that initially subscribed to what was called the first Hyde Amendment, which specified that 'none of the funds shall be used to perform abortions.' Period. That is where the House started out several years ago") (Rep. Michel).

* The court of appeals had before it only the FY 1977 and FY 1978 Hyde Amendment debates. In dismissing the "few" comments of this nature that it acknowledged, the court characterized them as "apparently intended to distinguish between a prohibition on abortions (which would be unconstitutional . . .), and a mere refusal to fund abortions." *Zbaraz II*, U.S.J.S. App. 45a. Some of those commenting on federal funding restrictions did distinguish the question of whether abortions could be prohibited, from that of whether the federal government should fund them, *e.g.*, 125 CONG. REC. H5257 (daily ed. June 27, 1979) (Rep. Tauke). But most made no such distinction. In any event, the relevant distinction the legislators should have drawn, for the court of appeals to have been correct, was that between federal funding of abortions and required coverage of abortions under Medicaid.

appellants and the court of appeals cite no explicit authority to meet their burden under TVA. Those remarks affirmatively suggesting that a restriction on the use of federal funds would be the *only* effect of the Hyde Amendment are more frequent than specific contrary suggestions of intent to repeal by implication.*

* Sen. Stevens, minority whip, said that the FY 1977 rider "only deals with who pays the bill, whether it is the Federal Government or the State Government." 122 CONG. REC. 30990 (1976). "[W]hat we are talking about is not legislation as to whether or not there would be an abortion but legislation to determine what is the fair burden sharing between the Federal Government and the State Government with regard to payments for abortions which take place under State law without regard to the bill we have considered." *Id.* Speaking against a proposed restrictive abortion rider to the Department of Defense appropriations bill, Sen. Stevens compared the impact of the rider to those previously attached to the Labor-HEW appropriations acts, stating that because the federal government alone had assumed the obligation to provide medical services to armed forces personnel, the restrictive rider would itself limit the provision of these services. 125 CONG. REC. S15975 (daily ed. Nov. 6, 1979). But "[i]n the other circumstances, when we were dealing with HEW, we were talking about who should pay. Should a state pay or should the Federal government pay." *Id.* *See also* remarks of Sen. Stevens, *id.* at S16712 (daily ed. Nov. 15, 1979); *id.* at S13737 (daily ed. Sept. 28, 1979); 122 CONG. REC. 30990 (1976). Rep. Smith was a supporter of the riders. He stated, "[A]ll we are talking about really is whether or not we will refund to the States a few hundred thousand dollars per year. It will make no difference whatever in the number the States pay for, but will reduce by a few the number for which they receive reimbursement. That is all we are talking about." 125 CONG. REC. H5257 (daily ed. June 27, 1979). Sen. Eagleton, also a supporter, said that "[d]ecisions have been made over the years as to what medical services are and are not covered through Federal funds. The Hyde Amendment is simply another limitation on what services will be covered by Federal funds." *Id.* at S9860 (daily ed. July 19, 1979). And Sen. Magnuson, a member and later chairman of the Senate Appropriations Committee, characterized the entire debate over the FY 1977 rider as an "argument over whether the State should handle [funding of abortions] or the national government." 122 CONG. REC. 19439 (1976).

And while it is not surprising that legislators would fail to mention effects they were not intending to bring about, it is startling to find an intent to repeal by implication when nobody—with the apparently lone exception of Rep. Russo—declared such an intent. Compare *TVA v. Hill*, 437 U.S. at 191-93, where several Congressmen and Senators on the House and Senate appropriations committees with jurisdiction over appropriations for TVA specifically expressed their view that the Endangered Species Act did not prevent completion of the Tellico Dam. If the history there did not “affirmative[ly] show” an intent to repeal, 437 U.S. at 190, Congress’ intention to repeal the states’ obligations under Title XIX can hardly be found in the Hyde Amendment debates.

With no remarks specifically declaring Congress’ intent to repeal, the court of appeals supported its conclusion of a substantive change on the basis that some supporters and opponents of the Hyde Amendment assumed that when federal funding for most medically necessary abortions was withdrawn, the states similarly would restrict abortions. *Zbaraz II*, U.S.J.S. App. 46a. The flaw in the court of appeals’ approach is that this expectation of some legislators appears to have flowed not from an intent to change Title XIX, but from inattention to, indifference to, or confusion about, what Title XIX requires. The silence in the debates respecting the legal relationship between the Hyde Amendment and Title XIX strongly suggests that the legislators participating in the debates had not formed, much less shared, any specific intent or understanding at all regarding the relationship between the Hyde Amendment and Title

XIX.* Most legislators undoubtedly brought with them to the “emotional floor debates” (*Zbaraz II*, U.S.J.S. App. 45a) deeply held feelings about abortion, *McRae v. Secretary of HEW*, No. 76 C 1804, slip op. at Annex *passim* (E.D.N.Y. Jan. 15, 1980); and all presumably brought with them a general understanding that the Hyde Amendment incorporated an anti-abortion position. The intensity and substance of most legislators’ remarks can be explained by reference to these concerns and that understanding alone; they spoke, as legislators not uncommonly do, without focusing on the specific statutory questions which later become relevant in cases coming before the courts. See *Jewell Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161, 169-70 (1945); *National Nutritional Foods Association v. FDA*, 504 F.2d 761, 780-81 (2d Cir. 1974) (Friendly, J.).

The same points can be made with regard to other convoluted inferences drawn by the court of appeals. Relying on the “frequently reiterated belief . . . that taxpayers ought not to be compelled by the federal government to finance abortions which were repugnant to them on religious or moral grounds,” the court of appeals stated that “[t]his concern *would apply* with at least equal force if the tax expenditures required by federal law came from the state rather than the federal treasury.” *Zbaraz II*, U.S.J.S. App. 46a (emphasis add-

* A few legislators speaking in support of the FY 1980 rider were later to construe such silence as incorporating a presumption that the Act had never required coverage of abortions at all. The intervenors rely on such comments (discussed at pp. 120-21 *infra*) to support their understanding of Title XIX (Int. Br. 97-99). But those remarks, coming after court decisions interpreting Title XIX to require funding of all medically necessary abortions or Hyde Amendment abortions, were in all likelihood simple attempts to rewrite earlier legislative intention. See pp. 120-21n. *infra*.

ed). The question is not which concerns "would apply," but what legislators said. Moreover, most legislators expressing the type of "belief" on which the court of appeals relied, specifically addressed the compulsory use of "federal" tax dollars, spent by the "federal government."* These references are fully consistent with

* Even some of the excerpts from the debates to which the court of appeals referred (U.S.J.S. App. 47a, n.13) are ones in which legislators explained their views in this way, viz: 123 CONG. REC. H6084-85 (daily ed. June 17, 1977) (Rep. Obey); *id.* at H10835 (daily ed. Oct. 12, 1977) (Rep. Early); *id.* at S18584-85 (daily ed. Nov. 3, 1977) (Sen. Helms); *see also id.* at S11038 (daily ed. June 29, 1977) ("I think it is a moral crime that 300,000 [abortions per year] have been paid for by Federal tax dollars, much of which have been paid into the Federal treasury by people who do not believe in abortion for purely religious grounds or for moral reasons") (Sen. Hatch); 124 CONG. REC. H5358 (daily ed. June 13, 1978) ("throughout the prolonged debate on this issue of whether or not Federal taxpayers' money should be spent to finance abortion, on no occasion has the House of Representatives ever adopted a proposition similar to one proposed today by the gentleman from Ohio [Mr. Stokes], that we have no restrictions whatsoever on Federal funding of abortions") (Rep. Bauman); 125 CONG. REC. H5233 (daily ed. June 27, 1979) ("This language keeps the Federal Government out of the business of financing abortions. . . . This House should not force those taxpayers who are morally opposed to abortion, to foot the bill for them") (Rep. Luken); *id.* at S9852 (daily ed. July 19, 1979) ("I think of the millions of people across this country who do not want their money to be spent by the Federal Government to deliberately terminate the life of an innocent human being") (Sen. Helms).

To be sure, some legislators who objected to requiring taxpayers morally opposed to abortion to pay for it spoke in terms of the "taxpayers of this Nation," 123 CONG. REC. S11039 (daily ed. June 29, 1977) (Sen. Stennis), or simply "the taxpayers," *id.* at H12489 (daily ed. Nov. 29, 1977) (Rep. Bauman); *see also, e.g., id.* at H6088 (daily ed. June 17, 1977) (Rep. Rudd); *id.* at H6089 (Rep. Young) (both cited in *Zbaraz II*, U.S.J.S. App. 46a, n.11); 125 CONG. REC. S13574 (daily ed. Sept. 27, 1979) (Sen. Humphrey); 124 CONG. REC. H5358 (daily ed. June 13, 1978) (Rep. Lloyd); 123 CONG. REC. S11041 (daily ed. June 29, 1977) (Sen. Helms). Such isolated general

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the action the legislators explicitly took. They wished to dissociate the use of federal funds from abortion and did not take any action with regard to more sweeping anti-abortion measures.

The court of appeals also felt that its conclusion found some support in the awareness of some legislators that their actions could be construed as "legislation via an appropriations bill." *Zbaraz II*, U.S.J.S. App. 47a. The court simultaneously recognized that the Hyde Amendment, construed strictly as a limitation on the use of federal funds, would be "legislation" within the meaning of House and Senate rules against "legislation" in an appropriations bill, U.S.J.S. App. 47a, n.13, since it would impose duties and limits on the discretion of federal officials. The only legislators who specifically expressed what they meant by "legislating in an appropriations bill," did so in terms of imposing duties on federal officials. 123 CONG. REC. H6082-83 (daily ed. June 17, 1977) (Reps. Allen, Flood, Bauman, Holtzman, Hyde, Burke). No legislator ever expressed the view that the Hyde Amendment would be "legislating" in the sense of altering the substantive coverage provisions of Title XIX. Again, the court of appeals' inference is strained. The comments on which it relied are perfectly consistent with legislators' understanding of the reach of their own rules and require no inference that Congress intended to legislate far beyond the words in the bill.

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remarks, however, predicated on articulated moral objections to abortion, without any focus on the question of whether the Hyde Amendment was intended to alter the states' obligations under Title XIX, can hardly be said to demonstrate that Congress understood the Hyde Amendment to effect any such result. *See Jewell Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161, 169-70 (1945).

The court of appeals also stated that “[u]nlike the situation in the *Hill* case, there is no question here that Congress as a body was well aware of the implications of the Hyde Amendment and agreed to them.” U.S.J.S. App. 48a. This assertion is question-begging; no one ever articulated the “implications” to which the court of appeals found such widespread agreement.

Also dependent on nonexistent statements in the debates is the court of appeals’ attempt to distinguish *TVA* by noting that the Hyde Amendment was “geared specifically to the substantive provisions of the affected Act.” U.S.J.S. App. 49a. Congress was certainly aware that the appropriations act before it affected federal funding for, *inter alia*, Medicaid. The silence in the debates is more striking, rather than less, where Congress is aware of a nexus between the appropriations act before it and a related substantive statute, and with virtual unanimity fails specifically to express an intent to repeal. See *United States v. Vulte*, 233 U.S. 509 (1914); *United States v. Langston*, 118 U.S. 389 (1886).

Finally, the court of appeals noted that the Hyde Amendment riders were “in the form of limiting previously authorized expenditures,” U.S.J.S. App. 49a, and that the courts are “less hostile to [such] modifications via appropriations bills” than they are with respect to modifications authorizing arguably prohibited expenditures, as in *TVA*. *Id.* at 50a, n.17. Whether the cumulative decisions of the lower federal courts reflect such diminished hostility is unclear. See *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney v. United States*, 114 Ct. Cl. 38 (1949); *NLRB v. Thompson Products, Inc.*, 141 F.2d 794 (9th Cir. 1944). In any event this Court seems not to be impressed with the distinction the court of appeals made.

See *United States v. Vulte*, 233 U.S. 509 (1914); *United States v. Langston*, 118 U.S. 389 (1886).

The court of appeals’ conclusion is also called into question by subsequent Congressional activity. On December 11, 1979, the House passed an amendment to H.R. 4962, Child Health Assurance Act of 1979 (“CHAP”). CHAP itself would alter Title XIX in important respects and, as amended, passed the House. 125 CONG. REC. H11787 (daily ed. Dec. 11, 1979). The amendment to CHAP proposed a new section to Title XIX which would make the federal funding restriction on abortions permanent *and* relieve states of their obligations:

None of the funds authorized to be appropriated under this title shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; *Provided, however*, That nothing in this title shall be construed to require any State funds to be used to pay for any abortion.”

Id. at H11770; see *id.* at H11776.* Rep. Bauman, sponsor of the amendment, distinguished it from the Hyde Amendments in terms leaving little doubt that he deemed those provisions to have affected only federal funding of abortions:

I can attest as one of those supporting the Hyde Amendment language throughout its deliberations and adoption in recent years that the intention has been from the beginning to restrict Federal funding *Id.* at H11770.

* * *

* H.R. 4962 was referred to the Senate but has not yet been assigned to committee. The Senate finance committee had reported its own version of CHAP (S. 1204) in July, 1979; that version does not include any anti-abortion provision. *Id.*; see S. REP. NO. 274, 96th Cong., 1st Sess. (1979). S. 1204 has not yet been placed on the Senate calendar.

[The new amendment] says that each State has the right to act for itself and impose restrictions that it may wish, whether it wants to pay for all abortions or to pay for no abortions.

* * *

[T]he amendment that I am offering only goes to the expenditure by the States of their own funds for abortions. It would not in any way change the Hyde amendment restrictions, for Federal funding of abortions. That is the distinction that has to be made.

Id. at 11773. Rep. Hyde agreed. He stated that the intent of the Bauman amendment was to "eliminate . . . the imposition of a Federal standard on States [to fund abortions]," *id.* at H11771, and that in the Hyde Amendment, Congress had said that "we will fund no abortions except to save the life of the mother . . ." *Id.* at H11772; *see also id.*, at H11774 (Rep. Lungren); *id.* at H11771-73 (Reps. Waxman and Carter).*

* Reps. Bauman, Hyde, Lungren and Luken, to be sure, argued that the Bauman amendment was meant to reverse the several federal court decisions, such as the court of appeals decision here, which had held Title XIX to require the states to fund those abortions for which federal funds were available. *E.g.*, 125 CONG. REC. H11770-72 (daily ed. Dec. 11, 1979) (Reps. Bauman and Hyde). The comments were intended to explain their understanding that the Hyde Amendment had not been meant to prohibit the states from refusing to cover even the restricted class of abortions that the provision funded—that on the contrary, it had been meant to leave unaffected "the rights of the States." *Id.* at 11770 (Rep. Bauman). They expressed the view that these rights under the Act included the right not to cover any abortions under Medicaid, *e.g.*, *id.* at H11770-71 (Rep. Bauman); *id.* at H11771-72 (Rep. Hyde), presumably even ones necessary to save a woman's life. Of course, supporters of the Hyde Amendment had not articulated previously this specific understanding of Title XIX. *See pp.* 104-118 *supra*. These few remarks, from legislators who considered even the Hyde

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The root fallacy of the forced arguments of the court of appeals and appellants is that they equate the anti-abortion sentiment of a majority of legislators with a directed intent to take the specific anti-abortion action of altering the coverage requirements of Title XIX—an intent which neither the measure before them nor legislators speaking on its behalf specifically expressed. This Court should hesitate to ascribe such a far-reaching action to Congress' silence respecting any intent to alter a substantive statute when the consequences of that action would damage health in an otherwise comprehensive program intended to provide medically necessary care for the poor. A step like that should be taken deliberately and by legislators, not by courts in their names.

Having lost an implied repeal argument in *TVA v. Hill*, 437 U.S. 153 (1978), and presumably recognizing that *TVA* dooms any such argument here, the United States argues instead that Medicaid, as a scheme of cooperative federalism, so thoroughly intertwines federal matching funds with requirements imposed on the states that the suspension of federal funds for a particular aspect of the program necessarily, albeit *sub silentio*, suspends the programmatic requirements. Con-

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Amendment too "liberal," came fourteen years after the establishment of the Medicaid program, almost seven years after the legalization of abortion in all the states, and four years after the first Hyde Amendment debates; they came after HEW had taken a contrary position and after contrary court decisions these legislators were attempting in other respects to overturn. The timing and context of these comments expose them as a belated and disingenuous attempt to read a specific abortion exclusion into Title XIX. They are not entitled to any interpretive weight. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1975).

gress has not written any provision into Title XIX stating that each coverage requirement is predicated on federal funding. The United States asks this Court to insert such a provision into the Act by implication and thus subject public assistance recipients to the vicissitudes of the annual appropriations process. In this sense, the United States quite properly is reluctant to "disavow" (U.S. Br. 47n.27) the court of appeals' analysis; under its own approach, every appropriations measure for Medicaid (and presumably every other federal-state matching program under the Social Security Act) would repeal, by implication, pre-existing service and administrative requirements to the extent that the measure did not authorize federal matching payments for those requirements. The United States' position therefore reverses TVA's strong presumptions against silent repeals by appropriations measures, and institutionalizes the contrary presumptions.

It is thus particularly surprising that the United States asserted the contrary position shortly before TVA. In *McRae v. Mathews*, 421 F.Supp. 533 (E.D. N.Y. 1976), on a motion in this Court for a stay pending appeal of a district court order enjoining the FY 1977 Hyde Amendment (Pub. L. No. 94-439, § 209), the Solicitor General stated:

While Title XIX may link the states and the federal government "in a fiscal partnership to provide for medical assistance to the needy" [quoting the district court opinion], it is clear that, under the medicaid program, the states' duty to fund medical procedures covered by their plans is wholly independent of their right to subsequent federal reimbursement. Plaintiffs' constitutional rights to obtain or to perform an abortion therefore were not and could not have been restricted by enactment of the Hyde Amendment.

Memorandum for the Secretary of HEW in Opposition to the Application for a Stay Pending Appeal at 6 (U.S. Sup. Ct. No. A-346, filed November, 1977). HEW has taken the same position in response to the Hyde Amendment instruction that the appropriations rider be "rigorously enforced" by regulation. HEW's responsive regulations address only "Federal financial participation," 43 Fed. Reg. 4570 (1978), and supplemental HEW comments state:

These regulations only govern the instances where Federal funding is available for abortions and other medical procedures. *They do not deal with the separate question of circumstances under which a State must fund abortions under the Medicaid program.*

43 Fed. Reg. 31875 (1978) (emphasis added).

42 U.S.C. § 1396a imposes requirements on the states. 42 U.S.C. § 1396b provides federal funding for most, but not all, services. Within the universe of each title of the Social Security Act, the federal-state link is between the conformity of state programs in the aggregate and the provision of federal funds in the aggregate. While the state's general participation in Medicaid is induced by federal funding in the aggregate, nothing ties each specific service requirement to federal funding.

Social Security Act programs show a federal funding pattern of variation and complexity that the United States' current position ignores. For each state the federal matching share varies from 0 to 100%, or more,*

* In one instance the state may obtain 15% of what the federal match for the service would be but for the fact that the state has provided *no medical assistance* because it has collected child support to cover the bills. 42 U.S.C. § 1396b(p)(1) (added by Pub. L. No. 95-142, § 11(a), 91 Stat. 1175

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depending on the particular service or administrative function. For most items Illinois' federal match is 50%, but exceptions abound. The federal match is higher for some functions and services—*e.g.*, 90% for certain fraud detection functions (42 U.S.C. § 1396b(a)(6) (1976), *as amended by* Pub. L. No. 95-142, § 17(a), 91 Stat. 1175 (1977)), and 90% for family planning services (42 U.S.C. § 1396b(a)(5) (1976)). Other provisions provide less than normal federal match, *e.g.*, 42 U.S.C. § 603 (loss of 1% of all federal AFDC match if the state has inadequate family planning, early and periodic screening, diagnosis and treatment, or work registration programs); 42 U.S.C. § 1396b(g) (33⅓% maximum federal share for certain Medicaid nursing home and mental hospital services). And in a number of instances there is no federal match in circumstances contradicting the United States' assertion (U.S. Br. 46n.26) that Congress only denies federal funds when it imposes requirements on the states explicitly and for the purpose of maintaining pre-existing benefits. Such examples also contradict the court of appeals' additional assertion that Congress only imposes "such conditions . . . for the apparent purpose of encouraging the states to undertake programs Congress deemed to be desirable." *Zbaraz II*, U.S.J.S. App. 47a, n.12.

(a) In 1967 Congress passed legislation freezing the number of children in each state's AFDC program for

Footnote continued

(1977)). This is a bonus. Similarly, AFDC reimbursement is structured in relation to the number of children rather than to grant levels in a manner permitting some states not merely to receive a 100% federal match but to receive more and profit from some children's eligibility. See *Dandridge v. Williams*, 397 U.S. 471, 512-13 (1970) (Marshall, J. dissenting).

whom federal matching would be available after July 1, 1968. Social Security Amendments of 1967, Pub. L. No. 90-248, § 208(b), 81 Stat. 821 (1968) (adding 42 U.S.C. § 603(d)).* There was no "clear and explicit" contemporaneous legislation mandating "unilateral state funding" for such children (U.S. Br. 46n.26). Since the general provisions of the AFDC statute continued to mandate payments to all eligible persons, *see* 42 U.S.C. § 602(a)(10) (1976), the state's obligation to extend aid (rather than deny aid or create a waiting list) remained intact. Nevertheless, Congress "conditioned a state's participation in the [AFDC] program upon its willingness to assume *new* financial obligations in the absence of federal assistance." U.S. Br. 46n.26 (emphasis in original). Indeed, Congress later recognized this had been the effect when it repealed the limitation. Act of July 9, 1969, Pub. L. No. 91-41, § 3(a), (b), 83 Stat. 44 (1969); *see* S. REP. NO. 223, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 1051, 1053 ("the States would still be required under Federal law to provide assistance promptly to every needy child meeting the State's eligibility standards—but the entire cost of assistance to children in excess of the limit would be borne by the States . . .").

(b) Many aged and disabled Medicaid recipients are also eligible for Medicare, 42 U.S.C. § 1395 *et seq.* (1976 & Supp. I 1977). Coverage under "Part B" of Medicare—mainly physicians' services—requires payment of a monthly premium. States may pay premiums for the

* Imposition of this freeze was extended to July 1, 1969, and amended in part by Pub. L. No. 90-364, § 301, 82 Stat. 251 (repealed 1969).

medically needy, even though no federal matching is available for the premium payments. 42 U.S.C. § 1395v(a), (b), (h) (1976). If there is no premium payment (and thus no Medicare coverage), the state receives no federal reimbursement for those Medicaid services it provides to the medically needy which otherwise would have been covered by Medicare. 42 U.S.C. § 1396b(b)(1) (1976); 42 C.F.R. § 431.625(c) (1979).*

(c) In passing the PSRO statute, Congress provided that "no Federal funds . . . shall be used" to pay for a service properly disapproved by a PSRO on grounds of lack of medical necessity. 42 U.S.C. § 1320c-7. Under the Solicitor General's approach this cut-off of federal match alone would have sufficed to alter states' obligations. Congress did not agree, since it also explicitly imposed PSRO requirements on the programmatic aspect of state programs. 42 U.S.C. § 1320c-13. In the floor debates, moreover, Senators recognized that the PSRO provisions, if unaccompanied by repeal of comprehensiveness and maintenance of effort provisions, would leave the states under a mandate to provide services otherwise explicitly precluded from both coverage and funding by the two separate provisions of the new amendments (i.e., those not medically necessary but falling under the rubric of comprehensiveness or continued because of the maintenance of effort requirement). See 118 CONG. REC. 33898-99 (1972) (remarks of Sens. Bennett, Long).

* For a description of the impact on the states of this Hobson's choice, see GAO, REP. NO. HRD-79-96, SIMPLIFYING THE MEDICARE/MEDICAID BUY-IN PROGRAM WOULD REDUCE IMPROPER STATE CLAIMS OF FEDERAL FUNDS, 42-43 (Oct. 2, 1979); see also *Doe v. Busbee*, 471 F.Supp. at 1333; *Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F.Supp. at 538, analogizing these provisions and the Hyde Amendment.

(d) Since 1975 Congress has required states to make available to non-welfare families the state agency procedures for establishing paternity and collecting child support. 42 U.S.C. § 654(6) (1976). States can charge fees for this service, but after a short period of match for start-up costs, federal reimbursement for the mandate ends: "the collection activities . . . [are] envisioned as being self-financing, unless a State decides that it does not want to charge for the costs of the service." S. REP. NO. 1356, 93d Cong., 2d Sess. 55, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8158 (describing 42 U.S.C. §§ 654(6), 655(a)).*

Numerous other examples can be found in the Medicaid program and in other welfare programs of substantive requirements imposed on the states without corresponding federal matching funds.** Considered in-

* The fiscal damage to the state of not paying for medically necessary abortions and incurring large additional AFDC and Medicaid costs (even with federal matching) far exceeds the cost of assuming 100% of the cost of abortions. See *Hodgson v. Board of County Comm'rs*, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶30,159 at 10,074 (8th Cir. Jan. 9, 1980); pp. 7-8; 60n *supra*; see also *Preterm, Inc. v. Dukakis*, 591 F.2d at 136n.1 (Bownes, J. dissenting).

** In addition to the examples the Solicitor General cites (U.S. Br. 46n.26):

(1) There is no federal match for services (including mandatory services) to the extent that a recipient also has private insurance with a provision excluding insurance coverage for items for which Medicaid will pay. 42 U.S.C. § 1396b(o). The State Medicaid agency must therefore assume 100% of the cost of services due to the content of policies created by private insurers and permitted by state insurance regulators.

(2) 42 U.S.C. § 1396a(f) requires that certain blind and disabled persons optionally covered under Medicaid in 1972 remain covered, even when no federal matching funds for the services provided to such persons, in 1972 or at present, were or are available. See *Lewis v. Shulimson*, 400 F.Supp. 807

(Footnote continued on following page)

dividually and cumulatively these examples foreclose any attempt to distinguish the Hyde Amendment from other federal funding restrictions that leave programmatic requirements unaffected. The court of appeals discussed none of these examples; the United States' Brief cites only two carefully selected ones. Only such avoidance and selectivity permit the mischaracterizations used to distinguish them. See p. 124 *supra*; U.S. Br. 46n.26.

The United States asserts, without specification, that the remarks in the Hyde Amendment debates cited by the court of appeals support its position on the original relationship between Title XIX program requirements and federal funding (U.S. Br. 49). Those remarks do not

Footnote continued

(E.D. Mo. 1975), *aff'd*, 534 F.2d 794 (8th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

(3) Under 42 U.S.C. § 607(b)(2)(A), a state covering AFDC families with an unemployed parent must certify that parent to the Secretary of Labor within 30 days. While the state's failure to refer would not deprive an eligible family of its right to assistance, the failure would stop federal matching funds. 42 U.S.C. § 607(c)(B).

(4) The state must license or approve as meeting state licensing standards all homes in which it places children eligible for the Aid to Families with Dependent Children-Foster Care (AFDC-FC) Program. 42 U.S.C. § 608. If it does not license or approve the homes, the state is ineligible for any federal sharing for AFDC-FC payments and services to the child, but it is still required, under Title IV-A, to provide AFDC-FC assistance "without Federal financial participation." HEW INFORMATION MEMORANDUM APA-IM-71-7 (1971).

(5) 7 U.S.C. § 2019(d) and 7 C.F.R. § 272.1(b) prohibit reduction of, *inter alia*, state-funded general assistance grants as a consequence of a family's participation in the federal food stamp program.

(6) HEW itself attempted, albeit without any statutory authorization, to withhold federal funds to the states for certain mandatory paternity determination services. See *Reser v. Califano*, 467 F.Supp. 446 (W.D. Mo. 1979).

support the assertion; but even if they did, the "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1975). This is particularly true where, as here, the "post-passage remarks" come years after the legislation they purport to interpret and were ordinarily made by persons having nothing to do with original passage of the legislation or relevant amendments. If the United States is understood instead as arguing that the understanding of the legislators debating the Hyde Amendment can change what would otherwise be the interpretation of Title XIX, then it is logically identical to the court of appeals' analysis of an implied substantive change. And as such, it must overcome all the same obstacles standing in the way of the court of appeals' conclusion.

The policy of Title XIX is to provide medically necessary care to eligible recipients. Federal funding, in the aggregate, is a means to accomplish that policy or goal. *Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F.Supp. at 538. Congress, unlike the Solicitor General and the court of appeals, has never mistaken the means for the end: the purpose of Medicaid is to provide medical care, not funds to the states. Consistently with this purpose, and using aggregate federal funding as its means, Congress has cut off funds for specific items which it has "deemed . . . desirable," *Zbaraz II*, U.S.J.S. App. 47a, n.12, and items it has deemed undesirable. It has imposed unfunded requirements on the states contemporaneously and explicitly, and by implication. It has done so where fully funding the program would cost the state money and where, as in the instant case, the state would save money. It has taken the action for new and old plan requirements. It simply never has assumed

that such funding cut-offs perforce invalidate statutory requirements, or that Title XIX implicitly incorporates such a rule.

V.

THE HYDE AMENDMENT, IF CONSTRUED TO RELIEVE ILLINOIS OF ITS STATUTORY OBLIGATION TO CEASE DISCRIMINATING AGAINST WOMEN REQUIRING MEDICALLY NECESSARY ABORTIONS, AND IF ITS CONSTITUTIONALITY IS PRESENTED IN THESE APPEALS, DEPRIVES PLAINTIFFS OF THEIR RIGHTS UNDER THE FIFTH AMENDMENT.

Appellees have argued that the Hyde Amendment in no way relieves Illinois of its obligation under the Social Security Act to provide Medicaid funding for medically necessary abortions. Under this interpretation, appellees are not harmed by the Hyde Amendment, and there is no reason for this Court to reach the question of its constitutionality. Even if the Hyde Amendment is understood to relieve Illinois of its statutory obligation to fund medically necessary abortions, this Court need not reach the question of its constitutionality in these appeals. Appellees can obtain full relief against state officials. Thus, the question of the constitutionality of the Hyde Amendment has never been at issue in this case, and appellees have argued that both the district court and this Court are without jurisdiction to reach it. *See pp. 28-30 supra.*

If, however, this Court should construe the Hyde Amendment to relieve Illinois of a statutory obligation to fund medically necessary abortions and should reach the issue of its constitutionality, such a construction would implicate the federal government in the state action in a way that simple refusal to pay for required procedures does not. For the federal government "may

not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *see Westcott v. Califano*, 99 S.Ct. 2655 (1979); *see also Townsend v. Swank*, 404 U.S. 282 (1971).

There is no peculiar federal interest present here to qualify this general rule of constitutional law. This Court has essentially equated the principles constraining the federal government under the fifth amendment's due process clause with those constraining the states under the due process and equal protection clauses of the fourteenth amendment. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638n.2 (1975).

If the Hyde Amendment is construed as an implied repeal of Title XIX's requirement that Illinois cover medically necessary abortion services, the federal government has no interest in restricting medically necessary abortions that is constitutionally distinguishable from state interests. All parties then agree that the fifth and fourteenth amendment standards to be applied here are identical (U.S. Br. 37; St. Br. 23; *see* Int. Br. 44). In those circumstances, since the restrictive Illinois abortion funding policy is unconstitutional, it follows that the Hyde Amendment is unconstitutional as well.*

* Indeed, if Title XIX itself is construed as permitting discriminatory refusal by a state to cover medically necessary abortions, it suffers from a similar constitutional infirmity.

CONCLUSION

The appeals of the State and the intervenors should be dismissed insofar as they seek review of the earlier court of appeals decision herein. The judgment of the district court should be vacated to the extent it declares the Hyde Amendment unconstitutional. The judgment of the district court otherwise should be affirmed.

Respectfully submitted,

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March 1, 1980

APPENDIX

APPENDIX A

ILLINOIS MEDICAL ASSISTANCE PROGRAM RULES (Handbook For Physicians)

. . .

144. Audits

All services for which charges are made to the Department are subject to audit. The initiation of audit proceedings should not be considered as an indication of any wrongdoing on the part of the provider. Rather, an audit should be looked upon as an on-going and necessary part of the procedure for monitoring health care facilities and services required by Federal regulations and State law. Providers are selected for routine audit by a random sampling of billings processed and by other criteria determined by the Department. During a review audit, the provider may be asked to furnish to the Department or its authorized representative, pertinent information regarding claims for payment. Should an audit reveal incorrect payments were made, the provider must make restitution through recoupment procedures discussed in Topic 145.

145. Recoupment

The Department will recover overpayments made to a provider resulting from improper billing practices. The determination of impropriety will be based on Department Rules and Regulations, policy and procedures stated in this handbook, and/or as evidenced by statistical data on program utilization compiled from claims paid.

The provider will be notified in writing of the nature of any discrepancies, the method of computing the reasonable dollar amount which is to be refunded, and any further actions which the Department may take in the matter.

If the provider is not in agreement with Department actions with respect to recoupment of funds paid in connection with the discrepancies noted, he may, within 10 days of receipt of the written notification, submit a request for a hearing.

The provider is to mail the written response and supporting documents to:

Review Coordinator
Illinois Department of Public Aid
Post Office Box 4466
Springfield, Illinois 62708

The Department will notify the provider in writing of the date, time, and place of the review hearing. See Section III, General Appendix 7B, Rules of Practice For Medical Vendor Administrative Proceedings, for details of the review process.

150. Fraud in the Medical Assistance Program

Providers are subject to Section 12-15.1 of Chapter 23 of the Illinois Revised Statutes pertaining to penalties for vendor fraud and kickbacks.

Title XIX of the Social Security Act, under which the Medical Assistance program is administered, provides Federal penalties for fraudulent acts and false reporting. Federal regulations for the administration of Medical Assistance programs require notification to providers of the contents of the pertinent section of the Social Security Act.

151. False Reporting and Other Fraudulent Activities

Section 1909 of the Social Security Act prohibits kickbacks, false reporting and other fraudulent activities and provides for fines and imprisonment for persons who engage in such activities. Specifically, that statute provides:

(a) Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a ma-

terial fact in any application for any benefit or payment under a State plan approved under this subchapter,

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person, shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this title, be guilty of a felony and upon conviction thereof fined not more than \$25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than \$10,000 or imprisoned for not more than one year, or both.

• • •

APPENDIX B

FEDERAL STATUTES

42 U.S.C. § 1320c(1) (1976).

In order to promote the effective, efficient, and economical delivery of health care services of proper quality for which payment may be made (in whole or in part) under this chapter and in recognition of the interests of patients, the public, practitioners, and providers in improved health care services, it is the purpose of this part to assure, through the application of suitable procedures of professional standards review, that the services for which payment may be made under this chapter will conform to appropriate professional standards for the provision of health care and that payment for such services will be made—

only when, and to the extent, medically necessary, as determined in the exercise of reasonable limits of professional discretion. . . .

42 U.S.C. § 1320c-1 (1976), as amended by Pub.L. No. 95-142, § 5(a), (o)(1), 91 Stat. 1175 (1977).

(a) The Secretary shall (1) not later than January 1, 1974, establish throughout the United States appropriate areas with respect to which Professional Standards Review Organizations may be designated, and (2) at the earliest practicable date after designation of an area enter into an agreement with a qualified organization whereby such an organization shall be conditionally designated as the Professional Standards Review Organization for such area. If, on the basis of its performance during such period of conditional designation, the Secretary determines that such organization is capable of fulfilling, in a satisfactory manner, the obligations and requirements for a Professional Standards Review Organization under this part, he shall

enter into an agreement with such organization designating it as the Professional Standards Review Organization for such area.

(b) For purposes of subsection (a) of this section, the term “qualified organization” means—

(1) when used in connection with any area—

(A) an organization (i) which is a nonprofit professional association (or a component organization thereof), (ii) which is composed of licensed doctors of medicine or osteopathy engaged in the practice of medicine or surgery in such area, (iii) the membership of which includes a substantial proportion of all such physicians in such area, (iv) which is organized in a manner which makes available professional competence to review health care services of the types and kinds with respect to which Professional Standards Review Organizations have review responsibilities under this part,

. . .

(B) such other public, nonprofit private, or other agency or organization, which the Secretary determines, in accordance with criteria prescribed by him in regulations, to be of professional competence and otherwise suitable. . . .

. . .

(e) Where the Secretary finds a Professional Standards Review Organization (whether designated on a conditional basis or otherwise) to be competent to perform review responsibilities, the review, certification, and similar activities otherwise required pursuant to provisions of this chapter (other than this part) shall not be applicable with respect to those providers, suppliers, and practitioners being reviewed by such Professional Standards Review Organization, except to the extent specified by the Secretary. Nothing in the preceding sentence shall be construed as rendering inapplicable any provision of this chapter wherein requirements with respect to conditions for eligibility

to or payment of benefits (as distinct from reviews and certifications made with respect to determinations of the kind made pursuant to paragraphs (1) and (2) of section 1320c-4(a) of this title) must be satisfied.

42 U.S.C. § 1320c-4(a) (1976), as amended by Pub.L. No. 95-142, § 5(d)(3)(B)(i), (o)(2), 91 Stat. 1175 (1977).

(1) Notwithstanding any other provision of law, but consistent with the provisions of this part, it shall be the duty and function of each Professional Standards Review Organization for any area to assume, at the earliest date practicable, responsibility for the review of the professional activities in such area of physicians and other health care practitioners and institutional and noninstitutional providers of health care services (except as provided in paragraph (7)) in the provision of health care services and items for which payment may be made (in whole or in part) under this chapter for the purpose of determining whether—

(A) such services and items are or were medically necessary;

(B) the quality of such services meets professionally recognized standards of health care;

. . .

(2) Each Professional Standards Review Organization shall have the authority to determine, in advance, in the case of—

(A) any elective admission to a hospital, or other health care facility, or

(B) any other health care service which will consist of extended or costly courses of treatment,

whether such service, if provided, or if provided by a particular health care practitioner or by a particular hospital or other health care facility, organization, or agency, would meet the criteria specified in clauses (A) and (C) of paragraph (1).

. . .

42 U.S.C. § 1320c-5 (1976).

(a) Each Professional Standards Review Organization shall apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice in its regions (including typical lengths-of-stay for institutional care by age and diagnosis) as principal points of evaluation and review. . . .

(b) Such norms with respect to treatment for particular illnesses or health conditions shall include (in accordance with regulations of the Secretary)—

(1) The types and extent of the health care services which, taking into account differing, but acceptable, modes of treatment and methods of organizing and delivering care are considered within the range of appropriate diagnosis and treatment of such illness or health condition, consistent with professionally recognized and accepted patterns of care;

(2) the type of health care facility which is considered, consistent with such standards, to be the type in which health care services which are medically appropriate for such illness or condition can most economically be provided.

. . .

§ 1320c-7(a) (1976), as amended by Pub.L. No. 95-142, § 22(a)(1), 91 Stat. 1175 (1977).

Except as provided for in section 1320c-8 of this title and subsection (d) of this section, no Federal funds appropriated under any subchapter of this chapter (other than subchapter V) for the provision of health care services or items to be used (directly or indirectly) for the payment, under such subchapter or any program established pursuant thereto, of any claim for the provision of such services or items, unless the Secretary, pursuant to regulation determines that the claimant is without fault if—

(1) the provision of such services or items is subject to review under this part by any Professional Standards Review Organization, or other agency; and

(2) such organization or other agency has, in the proper exercise of its duties and functions under or consistent with the purposes of this part, disapproved of the services or items giving rise to such claim, and has notified the practitioner or provider who provided or proposed to provide such services or items and the individual who would receive or was proposed to receive such services or items of its disapproval of the provision of such services or items.

§ 1320c-8 (1976).

(a) Any beneficiary or recipient who is entitled to benefits under this chapter (other than subchapter V) or a provider or practitioner who is dissatisfied with a determination with respect to a claim made by a Professional Standards Review Organization in carrying out its responsibilities for the review of professional activities in accordance with paragraphs (1) and (2) of section 1320c-4(a) of this title shall, after being notified of such determination, be entitled to a reconsideration thereof by the Professional Standards Review Organization and, where the Professional Standards Review Organization reaffirms such determination in a State which has established a Statewide Professional Standards Review Council, and where the matter in controversy is \$100 or more, such determination shall be reviewed by professional members of such Council and, if the Council so determined, revised.

(b) Where the determination of the Statewide Professional Standards Review Council is adverse to the beneficiary or recipient (or, in the absence of such Council in a State and where the matter in controversy is \$100 or more), such beneficiary or recipient shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, where the amount in controversy is \$1,000 or more, to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. The Secretary

will render a decision only after appropriate professional consultation on the matter.

(c) Any review or appeals provided under this section shall be in lieu of any review, hearing, or appeal under this chapter with respect to the same issue.

§ 1320c-9 (1976), as amended by Pub.L. No. 95-142, § 5(e), (o) (3), 91 Stat. 1175 (1977).

(a)(1) It shall be the obligation of any health care practitioner and any other person (including a hospital or other health care facility, organization, or agency) who provides health care services for which payment may be made (in whole or in part) under this chapter, to assure that services or items ordered or provided by such practitioner or persons to beneficiaries and recipients under this chapter—

(A) will be provided only when, and to the extent, medically necessary; and

(B) will be of a quality which meets professionally recognized standards of health care; and

(C) will be supported by evidence of such medical necessity and quality in such form and fashion and at such time as may reasonably be required by the Professional Standards Review Organization in the exercise of its duties and responsibilities:

and it shall be the obligation of any health care practitioner in ordering, authorizing, directing, or arranging for the provision by any other person (including a hospital or other health care facility, organization, or agency), of health care services for any patient of such practitioner, to exercise his professional responsibility with a view to assuring (to the extent of his influence or control over such patient, such person, or the provision of such services) that such services or items will be provided—

(D) only when, and to the extent, medically necessary; and

(E) will be of a quality which meets professionally recognized standards of health care.

(2) Each health care practitioner, and each hospital or other provider of health care services, shall have an obligation, within reasonable limits of professional discretion, not to take any action, in the exercise of his profession (in the case of any health care practitioner), or in the conduct of its business (in the case of any hospital or other such provider), which would authorize any individual to be admitted as an inpatient in or to continue as an inpatient in any hospital or other health care facility unless—

(A) inpatient care is determined by such practitioner and by such hospital or other provider, consistent with professionally recognized health care standards, to be medically necessary for the proper care of such individual; and

(B)(i) the inpatient care required by such individual cannot, consistent with such standards, be provided more economically in a health care facility of a different type; or

(ii) (in the case of a patient who requires care which can, consistent with such standards, be provided more economically in a health care facility of a different type) there is, in the area in which such individual is located, no such facility or no such facility which is available to provide care to such individual at the time when care is needed by him.

(b)(1) If after reasonable notice and opportunity for discussion with the health care practitioner or hospital, or other health care facility, agency, or organization concerned, any Professional Standards Review Organization submits a report and recommendations to the Secretary pursuant to section 1320c-6 of this title (which report and recommendations shall be submitted through the Statewide Professional Standards Review Council, if such Council has been established, which shall promptly transmit such report and recommendations together with any additional

comments and recommendations thereon as it deems appropriate) and if the Secretary determines that such health care practitioner or hospital, or other health care facility, agency, or organization, in providing health care services over which such organization has review responsibility and for which payment (in whole or in part) may be made under this chapter has—

(A) by failing, in a substantial number of cases, substantially to comply with any obligation imposed on him under subsection (a) of this section, or

(B) by grossly and flagrantly violating any such obligation in one or more instances,

demonstrated an unwillingness or a lack of ability substantially to comply with such obligations, he (in addition to any other sanction provided under law) may exclude (permanently or for such period as the Secretary may prescribe) such health care practitioner or hospital, or other health care facility, agency, or organization from eligibility to provide such services on a reimbursable basis.

(2) A determination made by the Secretary under this subsection shall be effective at such time and upon such reasonable notice to the public and to the person furnishing the services involved as may be specified in regulations. Such determination shall be effective with respect to services furnished to an individual on or after the effective date of such determination (except that in the case of institutional health care services such determination shall be effective in the manner provided in subchapter XVIII of this chapter with respect to terminations of provider agreements), and shall remain in effect until the Secretary finds and gives reasonable notice to the public that the basis for such determination has been removed and that there is a reasonable assurance that it will not recur.

(3) In lieu of the sanction authorized by paragraph (1), the Secretary may require that (as a condition to the continued eligibility of such practitioner or provider to provide health care services on a reimbursable basis) such

practitioner or provider pay to the United States, in case such acts or conduct involved the provision or ordering by such practitioner or provider of health care services which were medically improper or unnecessary, an amount not in excess of the actual or estimated cost of the medically improper or unnecessary services so provided, or (if less) \$5,000. Such amount may be deducted from any sums owing by the United States (or any instrumentality thereof) to the person from whom such amount is claimed.

(4) Any person furnishing services described in paragraph (1) who is dissatisfied with a determination made by the Secretary under this subsection shall be entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(c) It shall be the duty of each Professional Standards Review Organization and each Statewide Professional Standards Review Council to use such authority or influence it may possess as a professional organization, and to enlist the support of any other professional or governmental organization having influence or authority over health care practitioners and any other person (including a hospital, or other health care facility, organization, or agency) providing health care services in the area served by such review organization, in assuring that each practitioner or provider (referred to in subsection (a) of this section) providing health care services in such area shall comply with all obligations imposed on him under subsection (a) of this section.

§ 1320c-13 (1976).

(a) In addition to the requirements imposed by law as a condition of approval of a State plan approved under any subchapter of this chapter under which health care services are paid for in whole or part, with Federal funds,

there is hereby imposed the requirement that provisions of this part shall apply to the operation of such plan or program.

(b) The requirement imposed by subsection (a) of this section with respect to such State plans approved under this chapter shall apply—

(1) in the case of any such plan where legislative action by the State legislature is not necessary to meet such requirement, on and after January 1, 1974; and

(2) in the case of any such plan where legislative action by the State legislature is necessary to meet such requirement, whichever of the following is earlier—

(A) on and after July 1, 1974, or

(B) on and after the first day of the calendar month which first commences more than ninety days after the close of the first regular session of the legislature of such State which begins after December 31, 1973.

§ 1320c-20(d) (1976), as amended by Pub.L. No. 95-142, § 5(d) (2) (D), 91 Stat. 1175 (1977).

(1) Each State agency may monitor the performance of review responsibilities by Professional Standards Review Organizations located within the State, in accordance with a State monitoring plan which is developed after review and comment by such organizations and is approved by the Secretary. The costs of activities of the State agency under and in accordance with such plan are reimbursable as an expense of the State agency under section 1396b(a) of this title.

. . .

(3)(A) Whenever a State agency monitoring the performance of review responsibilities by a Professional Standards Review Organization under a plan developed and approved under paragraph (1) submits to the Secretary reasonable documentation that the review determina-

tions of such organization have caused an unreasonable and detrimental impact on total State expenditures under subchapter XIX of this chapter and on the appropriateness of care received by individuals under the State's plan approved under such subchapter, and requests the Secretary to act, the Secretary shall, within thirty days from the date of receipt of the documentation, make a determination as to the reasonableness of the allegation by the State agency. If the Secretary determines that the review determinations of such organization have caused an unreasonable and detrimental impact on total State expenditures under subchapter XIX of this chapter and on the appropriateness of care received by individuals under the State's plan approved under such subchapter, unless the Secretary determines that the organization has taken appropriate corrective action, he shall immediately suspend such organization's authority in whole or in part under section 1320c-7(c) of this title to make conclusive determinations for purposes of payment under subchapter XIX of this chapter (and he may suspend such authority for purposes of payment under subchapter XVIII of this chapter until he (i) reevaluates such organization's performance of the responsibilities involved and determines that such performance does not have such unreasonable and detrimental impact, or (ii) determines that the organization has taken appropriate corrective action. Any determination made by the Secretary under this subparagraph shall be final and shall not be subject to judicial review.

42 U.S.C. § 1396 (1976).

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and

other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

42 U.S.C. § 1396a(a) (1976).

A State plan for medical assistance must—

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and

resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope; . . .

(13) provide—

(A)(i) for the inclusion of some institutional and some noninstitutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title, and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least—

(i) the care and services listed in clauses (1) through (5) of section 1396d(a) of this title or

(ii)(I) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan include hospital or skilled nursing facility services, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hos-

pital services from such hospital or skilled nursing facility services from such facility, . . .

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, . . .

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients;

(22) include descriptions of . . . (D) other standards and methods that the State will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality;

(30) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1396b(i)(4) of this title) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments (including payments for any drugs pro-

vided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care;

. . .

42 U.S.C. § 1396b(a) (1976), as amended by Pub.L. No. 95-142, §§ 10(a), 17(a), 91 Stat. 1175 (1977).

From the sums appropriated therefor, the Secretary (except as otherwise provided in this section) shall pay to each State which has a plan approved under this subchapter, for each quarter, beginning with the quarter commencing January 1, 1966—

(1) an amount equal to the Federal medical assistance percentage (as defined in section 1396d(b) of this title, subject to subsections (g) and (h) of this section) of the total amount expended during such quarter as medical assistance under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter, for individuals who are eligible for medical assistance under the plan and (A) are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or (B) with respect to whom there is being paid a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title, and except in the case of individuals sixty-five years of age or older and disabled individuals entitled to hospital insurance benefits under subchapter XVIII of this chapter who are not enrolled under part B of subchapter XVIII of this chapter, other insurance premiums for medical or any other type of remedial care or the cost thereof); plus

(2) an amount equal to 75 per centum of so much of the sums expended during such quarter (as found necessary by the Secretary for the proper and efficient administration of the State plan) as are attributable to compensation or training of skilled professional medical personnel, and staff directly supporting such personnel, of the State agency or any other public agency; plus

(3) an amount equal to—

(A)(i) 90 per centum of so much of the sums expended during such quarter as are attributable to the design, development, or installation of such mechanized claims processing and information retrieval systems as the Secretary determines are likely to provide more efficient, economical, and effective administration of the plan and to be compatible with the claims processing and information retrieval systems utilized in the administration of subchapter XVIII of this chapter, including the State's share of the cost of installing such a system to be used jointly in the administration of such State's plan and the plan of any other State approved under this title, and

(ii) 90 per centum of so much of the sums expended during any such quarter in the fiscal year ending June 30, 1972, or the fiscal year ending June 30, 1973, as are attributable to the design, development, or installation of cost determination systems for State-owned general hospitals (except that the total amount paid to all States under this clause for either such fiscal year shall not exceed \$150,000), and

(B) 75 per centum of so much of the sums expended during such quarter as are attributable to the operation of systems (whether such systems are operated directly by the State or by another person under a contract with the State) of the type described in subparagraph (A)(i) (wheth-

er or not designed, developed, or installed with assistance under such subparagraph) which are approved by the Secretary and which include provision for prompt written notice to each individual who is furnished services covered by the plan, or to each individual in a sample group of individuals who are furnished such services, of the specific services (other than confidential services) so covered, the name of the person or persons furnishing the services, the date or dates on which the services were furnished, and the amount of the payment or payments made under the plan on account of the services; plus

(4) an amount equal to 100 per centum of the sums expended with respect to costs incurred during such quarter (as found necessary by the Secretary for the proper and efficient administration of the State plan) which are attributable to compensation or training of personnel (of the State agency or any other public agency) responsible for inspecting public or private institutions (or portions thereof) providing long-term care to recipients of medical assistance to determine whether such institutions comply with health or safety standards applicable to such institutions under this chapter; plus

(5) an amount equal to 90 per centum of the sums expended during such quarter which are attributable to the offering, arranging, and furnishing (directly or on a contract basis) of family planning services and supplies;

(6) subject to subsection (b)(3) of this section, an amount equal to 90 per centum of the sums expended during each quarter beginning on or after October 1, 1977, and ending before October 1, 1980, with respect to costs incurred during such quarter (as found necessary by the Secretary for the elimination of fraud in the provision and administration of medical assistance provided under the State plan) which are attributable

to the establishment and operation of (including the training of personnel employed by) a State medicaid fraud control unit (described in subsection (q) of this section);

. . .

42 U.S.C. § 1396b(p) (1976), as amended by Pub.L. No. 95-142, § 11(a), 91 Stat. 1175 (1977).

(1) When a political subdivision of a State makes, for the State of which it is a political subdivision, or one State makes, for another State, the enforcement and collection of rights of support or payment assigned under section 1396k of this title, pursuant to a cooperative arrangement under such section (either within or outside of such State), there shall be paid to such political subdivision or such other State from amounts which would otherwise represent the Federal share of payments for medical assistance provided to the eligible individuals on whose behalf such enforcement and collection was made, an amount equal to 15 percent of any amount collected which is attributable to such rights of support or payment.

(2) Where more than one jurisdiction is involved in such enforcement or collection, the amount of the incentive payment determined under paragraph (1) shall be allocated among the jurisdictions in a manner to be prescribed by the Secretary.

42 U.S.C. § 1396d(a) (1976), as amended by Pub.L. No. 95-210, § 2(a), 91 Stat. 1485 (1977).

For purposes of this subchapter—

The term “medical assistance” means payment of part or all of the cost of the following care and services (if provided in or after the third month before the month in which the recipient makes application for assistance) for [eligible] individuals, . . .

. . .

whose income and resources are insufficient to meet all of such cost—

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

(2)(A) outpatient hospital services, and (B) consistent with State law permitting such services, rural health clinic services (as defined in subsection (l) of this section) and any other ambulatory services which are offered by a rural health clinic (as defined in subsection (l) of this section) and which are otherwise included in the plan;

(3) other laboratory and X-ray services;

(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies;

(5) physicians' services furnished by a physician (as defined in section 1395x(r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;

(6) medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;

(7) home health care services;

(8) private duty nursing services;

(9) clinic services;

(10) dental services;

(11) physical therapy and related services;

(12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select;

(13) other diagnostic, screening, preventive, and rehabilitative services;

(14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;

(15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals who are determined, in accordance with section 1396a(a)(31)(A) of this title, to be in need of such care;

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; and

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

APPENDIX C

FEDERAL REGULATIONS

42 C.F.R. § 435.903 (1979).

The agency's policies and procedures must ensure that eligibility is determined in a manner consistent with simplicity of administration and the best interests of the applicant or recipient.

42 C.F.R. § 440.210 (1979).

A State plan must specify that, as a minimum, categorically needy recipients are provided the services as specified in §§ 440.10-440.50.

42 C.F.R. § 440.220 (1979).

If the plan includes the medically needy, it must specify that the medically needy are provided, as a minimum—

(a) The medical and remedial services in §§ 440.10-440.50; or

(b) The services contained in any seven of the sections in §§ 440.10-440.160 and, if the plan includes inpatient hospital services or skilled nursing facility services, physicians' services to recipients who are patients in a hospital or skilled nursing facility, even though physician services, as defined in § 440.50, are not otherwise included for the medically needy.

42 C.F.R. § 440.230 (1979).

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

42 C.F.R. § 440.260 (1979).

The plan must include a description of methods and standards used to assure that services are of high quality.

FOR ARGUMENT

Supreme Court, U.S.
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No. 79-4

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**In the
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OCTOBER TERM, 1979

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EUGENE F. DIAMOND, M.D.,**

Appellants,

vs.

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Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

**REPLY BRIEF OF INTERVENING
DEFENDANTS-APPELLANTS**

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INDEX

	PAGE
Table of Authorities	ii
Argument	
I. Introduction and Summary of Argument	2
II. Plaintiffs' Constitutional Arguments Are Without Merit	3
A. The Abortion Funding Provisions—Though They May “Influence the Abortion Decision”—Do Not Impinge on Any Constitutional Right	3
B. A Belief of Some Legislators That the Fetus Is “Actual” Rather Than “Potential” Human Life Cannot Invalidate the Enactments	14
III. Plaintiffs' Statutory Arguments Are Without Merit	16
A. 42 U.S.C. § 1396a(a)(17) (1976) Establishes That Participating States May Specify What They Cover Within the Five Mandated Categories So Long as These Specifications Are “Reasonable” and “Consistent With the Objectives” of the Title	16
B. The Statute Does not Support the Claim That States Must Fund All “Medically Necessary” Items	20
C. The Abortion Funding Limitations Are Fully In Accord With the State's Valid Interest in Maternal Health	26
IV. Conclusion	32
Appendix	App. 1

TABLE OF AUTHORITIES

Cases

	PAGE
Beal v. Doe, 432 U.S. 438 (1977) ..	3, 14, 16, 21
Colautti v. Franklin, 439 U.S. 379 (1979)	14
District of Columbia Podiatry Society v. District of Columbia, 407 F.Supp. 1259 (D.D.C. 1975)	23
Harris v. McRae, No. 76 C 1804, slip op., (E.D.N.Y. Jan. 15, 1980)	24
Maher v. Roe, 432 U.S. 464 (1977)	3, 4, 5, 6, 12, 13, 15
Meyer v. Nebraska, 262 U.S. 390 (1923)	12, 13
National League of Cities v. Usery, 426 U.S. 833 (1976)	15
Norwood v. Harrison, 413 U.S. 455 (1973)	8
Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)	10
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	11
Planned Parenthood of Central Missouri v. Danforth, 423 U.S. 52 (1975)	14
Roe v. Norton, 408 F.Supp. 660 (D.Conn. 1975)	5
Roe v. Wade, 410 U.S. 113 (1973)	6, 7, 9, 14, 15
Stanley v. Georgia, 394 U.S. 557 (1969)	7, 9, 10
United States v. Nixon, 418 U.S. 683 (1974)	23
United States v. Orito, 413 U.S. 139 (1973)	10
United States v. Reidel, 402 U.S. 351 (1971)	10
United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971)	10
United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973)	10
Wisconsin v. Yoder, 406 U.S. 205 (1972)	7, 8

Statutes and Regulations

	PAGE
42 U.S.C. §1320e-5(b)(i) (1976)	24
42 U.S.C. §1396 (1976)	20
42 U.S.C. §1396a(a)(13) (1976)	20
42 U.S.C. §1396a(a)(13)(A)(i) (1976)	21
42 U.S.C. §1396a(a)(13)(B) (1976)	18, 21
42 U.S.C. §1396a(a)(13)(C) (1976)	18
42 U.S.C. §1396a(a)(17) (1976)	16, 17, 18, 19
42 U.S.C. §1396d(a)(1)-(5) (1976)	21
Pub. L. 90-248, §224(a), 81 Stat. 902 (1968)	21
42 C.F.R. §440.50(a) (1979)	25
42 C.F.R. §440.130(a) (1979)	22
42 C.F.R. §440.230(c)(1) (1979)	22
42 C.F.R. §463.27(c)(3) (1979)	24
43 Fed. Reg. 7406 (Feb. 22, 1978)	24

MISCELLANEOUS AUTHORITIES

Arey, <i>Developmental Anatomy</i> (6th ed. 1954)	16
Ayre and Scott, <i>Carcinoma in Situ and Pregnancy</i> , 176 JAMA 102 (1961)	App. 6
Barnhart, Henry and Lusher, <i>Sickle Cell</i> (2d ed. 1976)	App. 4
Bulfin, <i>A New Problem in Adolescent Gynecology</i> , 72 Southern Medical Journal 967 (1979)	App. 11
Burwell and Sidney, <i>The Special Problem of Rheumatic Heart Disease in Pregnant Women</i> , 166 JAMA 153 (1958)	App. 1

Center for Disease Control Abortion Surveillance Annual Summary (1977)	App. 7
Center for Disease Control <i>Morbidity and Mortality Weekly Report</i> (Feb. 2, 1979)	27
Corliss, <i>Patten's Human Embryology</i> (1st ed. 1976)	16
Fiakpui and Moran, <i>Pregnancy in the Sick Hemoglobinopathies</i> , 11 <i>Journal of Reproductive Medicine</i> 28 (1973)	App. 4
Gabbe, <i>New Ideas on Managing the Pregnant Diabetic Patient</i> , 13 <i>Contemporary OB/GYN</i> 109 (1979)	App. 9
Gorenberg, <i>Rheumatic Heart Disease, A Controllable Complication of Pregnancy</i> , 45 <i>Am.J.Ob.Gyn.</i> 835 (1943)	App. 1
Heffernan and Lynch, <i>Is Therapeutic Abortion Scientifically Justified?</i> , 19 <i>Linacre Q.</i> 11 (1952)	App. 8
Herreid, <i>Biology</i> (1st ed. 1977)	App. 7
Herwig and Jackson, <i>Renal Disease and Pregnancy</i> , 92 <i>Am.J.Ob.Gyn.</i> 1117 (1965)	App. 8
Horger, <i>Hemoglobinopathies in Pregnancy</i> , 17 <i>Clinical Obstetrics and Gynecology</i> 139 (1974)	App. 4
Horger, <i>Managing the Patient with Sick Cell Disease</i> , 2 <i>Contemporary OB/GYN</i> 55 (1973)	App. 4
H.R. Rep. No. 213, 89th Cong., 1st Sess., 9 (1965)	21
Ian, <i>Practical Obstetric Problems</i> (5th ed. 1979)	App. 1
Lee, R.A., Johnson, C.E., and Hanlon, D.G., <i>Leukemia During Pregnancy</i> , 84 <i>Am. J. Obstet. Gynecol.</i> (1962)	App. 7
Levine and Colea, <i>When Pregnancy Complicates Chronic Granulocytic Leukemia</i> , 13 <i>Contemporary OB/GYN</i> 49 (1979)	App. 5

MacLeod, <i>Rheumatic Heart Disease in Pregnancy</i> , 2 <i>Lancet</i> 668 (1954)	App. 1
Mall and Watts, <i>Psychological Aspects of Abortion</i> (1979)	App. 10
<i>Medical Complications During Pregnancy</i> (Burrow & Ferris, 1975)	App. 1, 2, 3, 6, 8, 9, 10
<i>The Merck Manual</i> (13th ed. 1977)	App. 2
Messer, <i>Medical Indications for Pregnancy Interruption, in Pregnancy Termination</i> (Sciarrar, Zatuchni and Speidel eds. 1979)	App. 8
Morrison and Wiser, <i>The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated With Sick Cell Hemoglobinopathies</i> , 48 <i>Obstetrics Gynecology</i> 516 (1976)	App. 4
Mulla, <i>Acute Leukemia and Pregnancy</i> , 75 <i>Am. J. Obstet. Gynecol.</i> (1958)	App. 7
O'Driscoll, Coyle and Drury, <i>Rheumatic Heart Disease Complicating Pregnancy</i> , 2 <i>Br. Med. J.</i> 767 (1962)	App. 1
O'Leary and Bepko, <i>Rectal Carcinoma and Pregnancy</i> , 84 <i>Am.J.Obstet.Gynecol.</i> 459 (1962)	App. 6
Pritchard & MacDonald, <i>Williams Obstetrics</i> (15th ed. 1976)	App. 3
Rovinsky and Guttmacher, <i>Medical, Surgical and Gynecological Complications of Pregnancy</i> (2nd ed. 1965)	App. 1
S. Rep. No. 404, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Ad. News 1943	17
S Rep. No. 1856, 86th Cong., 2nd Sess., reprinted in 1960 U.S. Code Cong. & Ad. News 3610	17

Sheehy, <i>An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia</i> , 75 Am.J.Obstet. Gynecol. 789 (1958)	App. 5, 6
Shettles, <i>Ovum Humanum</i> (1st ed. 1960)	16
Sim, <i>Abortion and the Psychiatrist</i> , 2 Brit. Med. J. 145 (1963)	App. 10
Ueland, <i>Cardiovascular Diseases Complicating Pregnancy</i> , 21 Clinical Obstetrics and Gynecology 431 (1978)	App. 1
Ueland, <i>What's the Risk When the Cardiac Patient Is Pregnant?</i> , 13 Contemporary OB/GYN 119 (1979)	App. 1
Warren, <i>Carcinoma of the Rectum and Pregnancy</i> , 45 Br. J. of Surgery 61 (1958)	App. 6

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**REPLY BRIEF OF INTERVENING
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ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Congress and the State of Illinois have chosen to fund abortions in circumstances when the life of the mother would be endangered if the fetus were carried to term, not to fund other abortions, and to fund all alternative means of treating complications of pregnancy. This legislative decision is the product of a rational integration of the State's equally legitimate interests in the life of the fetus and in maternal health. *See* Brief of Intervening Defendants-Appellants at 83, 91.*

Intervenors deny the medical claim advanced by Plaintiffs and Amici supporting them that abortions not funded under the congressional and state limitations before this Court are needed for health reasons, and demonstrate that there is no real dispute among the parties about availability of treatment alternative to abortion or the general effectiveness of such treatment. The primary dispute between the parties concerns the consequences of a given patient's unwillingness to cooperate with alternative treatment. Plaintiffs maintain that in such a circumstance an abortion is "medically necessary," while Intervenors argue that from a medical standpoint no such "necessity" exists.

In their constitutional arguments, Plaintiffs appear to concede that if there is no impingement on a fundamental right this matter ought to be resolved under a rational rela-

* The Hyde Amendment, of course, permits funding in rape and incest cases, as well as when the continuation of the pregnancy endangers the life of the pregnant woman. Since Plaintiffs have not raised issues involving rape or incest, no comment is made in this Reply Brief on such issues.

tionship test. If that test applies, *Maher v. Roe*, 432 U.S. 464 (1977), disposes of the central issue before this Court. But, as the arguments have developed through the appeal process, it has become apparent that Plaintiffs' chief present contention is that, in the light of what they contend to be an otherwise comprehensive entitlement to the funding of medically necessary items, failure to fund "medically necessary" abortions impinges on a fundamental right under a theory of "unconstitutional conditions" or "penalty analysis." This Brief will demonstrate that Plaintiffs' constitutional arguments must fail, unless the Court is willing to conclude that the State may not in any way "influence" a constitutionally protected decision-making process without impinging on a fundamental right.

Neither the Plaintiffs nor their Amici make a convincing statutory claim. Their argument that the Medicaid Title requires funding of all "medically necessary" items within five mandated categories would require a reversal of *Beal v. Doe*, 432 U.S. 438 (1977), and either evades or misinterprets relevant statutory provisions. In fact, the States are accorded reasonable discretion under the Medicaid Title and the Plaintiffs have been unable to mount any effective attack on the reasonableness of the abortion funding limitations before this Court.

II. Plaintiffs' Constitutional Arguments Are Without Merit

A. The Abortion Funding Provisions—Though They May "Influence the Abortion Decision"—Do Not Impinge on Any Constitutional Right

Plaintiffs admit that there exists no constitutional right to a publicly funded "medically necessary" abortion. Indeed, Plaintiffs state they "have never claimed any such fundamental right." Brief of Plaintiffs-Appellees at 42.

Nevertheless, they claim that failure of the government to pay for abortions, when other "medically necessary" medical procedures are funded, "seriously impinges upon the individual's decision-making with regard to fundamental rights" (Brief of Plaintiffs-Appellees at 43) because. Plaintiffs claim, the Illinois law and the Hyde Amendment constitute a "penalty" or "condition" on the exercise of a fundamental right. This, they assert, implicates a substantive due process right and therefore warrants strict judicial scrutiny. Brief of Plaintiffs-Appellees at 43, 50.

In support of their argument, Plaintiffs paraphrase this Court's language in *Maier* concerning equal protection analysis:

Once a state undertakes a program of public spending, however, the general contours of which cover all medically necessary care, it cannot in implementing that program discriminate against exercise of fundamental rights.

Brief of Plaintiffs-Appellees at 42-43.

Thus, Plaintiffs attempt to salvage their case through a strained effort to create a substantive due process issue out of an equal protection argument that was rejected by this Court in *Maier*.

This case, in their view, is distinguishable from *Maier* because here the State "generally" funds "medically necessary" care yet fails to fund "medically necessary" abortion. In *Maier* they assert that:

The plaintiffs . . . sought medical assistance funding for elective abortions. But there were no programs of coverage for elective care. . . . In the absence of a relevant discrimination, the plaintiffs in *Poelker* and *Maier* had no more claim to state funds for elective abortion than to funds to get them to the polls on election day.

Brief of Plaintiffs-Appellees at 44-45.

Plaintiffs' constitutional argument is therefore premised on the notion that the laws before this Court "discriminate" between the decision to abort and the decision to carry a fetus to term, thus penalizing or placing an unconstitutional condition on the abortion decision.*

Their theory is in direct conflict with this Court's holdings in *Maier*.

[*Roe v. Wade*] implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

Maier v. Roe, 432 U.S. at 474.

We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

Maier v. Roe, 432 U.S. at 474.

There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

Maier v. Roe, 432 U.S. at 475.

* There was, however, "discrimination" between forms of "elective" care at issue in *Maier*. Connecticut financed all pre- and post-natal medical care of indigent women without regard to "medical necessity" except for abortions. *Roe v. Norton*, 408 F.Supp. 660, 663 (D.Conn. 1975), *rev'd on other grounds sub nom. Maier v. Roe*. If Connecticut had not treated "elective" abortion differently from all other forms of medical care for the pregnant woman, there would have been no occasion for the careful equal protection analysis this Court undertook in *Maier*: no equal protection issue would have even arisen if "elective" abortion had not been treated differently from other "elective" medical treatment in pregnancy. Therefore, there is no basis for the Plaintiffs' claim that this case may be distinguished from *Maier* on equal protection grounds on the theory that the State treated abortion differently from other forms of medical treatment in this case in a way it did not in *Maier*.

Yet Plaintiffs do not ask this Court to overrule *Maier*, which is logically and jurisprudentially necessary if their claims are to prevail here. Rather, they appear to ask this Court to act as though *Maier* does not exist—or at least to ignore it—and to hold that any state program which encourages one alternate form of conduct, and thus influences the outcome of a decision made within a constitutionally protected sphere of privacy, is constitutionally invalid. In order to distinguish their “unconstitutionally invalidations” argument from the one this Court has rejected in *Maier* (432 U.S. at 474 n.8), the Plaintiffs now contend that the right recognized in *Roe* is not an interest in being free from state interference in seeking an abortion, but only an interest in deciding whether or not to seek an abortion in the first place. Brief of Plaintiffs-Appellees at 42. Their basis for invalidating the laws before this Court is not that they may prevent some women from effectuating their decisions to seek abortions, but merely that they “influence” some women’s decisions whether or not to abort.

Since *Roe v. Wade* vests the abortion decision directly in the woman, any attempt at all by the State to protect its interest in the fetus necessarily involves a potential “influencing” of the pregnant woman’s decision. This would be true even if the State sought to further its interest in the fetus by creating a better environment for carrying children to term as, for example, by improving prenatal care and by satisfying more fully the subsistence needs of the poor. If any such influence were held to impinge on the fundamental privacy right, the result would be that the government would have an important and legitimate interest (in the fetus) which it was utterly without legal authority to promote. This is as absurd as the notion of a legal right without a remedy.

The soundness of the principles underlying this Court’s decision in *Maier* can be illustrated by examining the application of its principles in contexts other than abortion. Discussions of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), are helpful in this regard.

The question is this: can the government ever constitutionally act to influence people toward one course of action when it has a legitimate interest in furthering that course of action, but when that interest is not sufficiently compelling to justify criminal prohibition of the alternative to that course of action?

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that the Amish have a Free Exercise right not to be compelled by the State to have their children attend high schools. The basis for the Amish religious objection to attendance at such schools is that it is “an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success and social life with other students.” *Id.* at 211. Because they believe in a life of simplicity and closeness to nature, the Amish reject “telephones, automobiles, radios, and television.” *Id.* at 217. Although the Court regarded the State’s “program of compulsory education” to be grounded in a “legitimate social conclusion,” *id.* at 235, it held this legitimate interest was not “so compelling that . . . the established religious practices of the Amish must give way.” *Id.* at 221. (The situation was thus very similar to that considered in *Roe v. Wade*, 410 U.S. 113, 162-163, [1973], where the Court regarded the “State’s . . . interest in potential life” to be “important and legitimate,” but not “compelling” enough to “override the rights of the preg-

nant woman.”) If the State, in view of its legitimate interests, decides to fund public education, but does not fund the agricultural vocational education which is in accord with the Amish religion, *Wisconsin v. Yoder*, 406 U.S. at 211, it certainly creates an incentive to attend public school. Indeed, it could be argued that the inevitable tendency of such a system is to lead the Amish into compromising their true beliefs. But in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), this Court held, “It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.”

The irrationality of Plaintiffs’ position is still clearer if one considers what it would mean to declare unconstitutional any state benefits scheme which, by funding things which the Amish consider religiously repugnant while not funding what they consider appropriate, influences the Amish to abandon principles of their beliefs—beliefs which are protected by the First Amendment.

Under such a theory, the State could not fund the development of improvements in agricultural technology (as, for example, by giving tax breaks or funding to farmers who employ advanced and efficient agricultural techniques), without providing similar financial incentives for those who use the comparatively primitive agricultural techniques and implements required by the Amish religion. The State could not offer grants or awards for “intellectual and scientific accomplishments” (an emphasis on which is “sinful worldliness” to the Amish) without providing equivalent rewards for the “life of ‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition,” which are lifestyles valued by Amish beliefs. *Wisconsin v. Yoder*, 406 U.S. at 211. Indeed, since the Amish can be said to reject “progress in human knowledge gen-

erally,” *id.* at 216, it could be argued that *any* State benefits proffered to inculcate such progress thrust upon the Amish, as an “unconstitutional condition” of receiving such benefits, a required abandonment of their religion.

Any such chain of logic is clearly untenable. Yet it flows inescapably from the proposition that any scheme of state benefits which, in advancing a legitimate state interest, tends by omission to create an influence contrary to one possible outcome of a constitutionally protected value choice amounts to placing an “unconstitutional condition” on the receipt of public benefits.

Similarly, in *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), this Court held that the individual possesses the “right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.” Although the Court held that the State has an important interest in control of the distribution of obscene materials, this interest was not deemed sufficient to warrant infringing on the right to privacy which encompasses the possession and use of such materials in the home. (Again, the situation was similar to that in *Roe v. Wade*, 410 U.S. at 162-163, where the Court regarded the State’s interest in the fetus as “important and legitimate,” but not “compelling” enough to override the rights of the pregnant woman.)

When public libraries purchase all forms of literary materials for the private use of the public, except obscene materials, they certainly fail to provide the individual who wishes to exercise the “right to satisfy his intellectual and emotional needs” through use of obscene materials the public means with which to do so. Thus, they create an incentive to read other kinds of literature—analogueous to the manner in which the Hyde Amendment and Illinois law fail to provide the woman with funds to procure a “needed” abortion, and provide incentives to pursue other forms of medical care.

But clearly this Court would not require all public libraries to purchase obscene materials on the grounds that, otherwise, an individual's decision whether or not to peruse them might be adversely "influenced," or even rendered incapable of fruition. See the opinions of Mr. Justice White writing for this Court in *United States v. Reidel*, 402 U.S. 351, 355-356 (1971), and in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), and the opinions of Chief Justice Burger writing for this Court in *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), *United States v. 12 200-ft. Reels*, 413 U.S. 123 (1973), and *United States v. Orito*, 413 U.S. 139 (1973). Similarly, this Court should not hold that the mere influence the Illinois law and the Hyde Amendment might have on a woman's decision whether or not to abort renders them constitutionally invalid.*

* If one applies Plaintiffs' argument to still other contexts, its unsoundness becomes yet more evident. For example, one may have a First Amendment right to form and hold an adverse opinion about handicapped people and their ability to be integrated fully into society. Although the State's legitimate interest in promoting integration of the handicapped into society would not be sufficiently compelling to punish expression of a belief that the handicapped are inferior, this does not mean that it is unconstitutional for the government to wage a television advertising campaign to influence the public to accept the handicapped as equal. This is so despite the fact that the governmental activity is designed to induce one to abandon one's constitutionally protected beliefs about the handicapped.

It is to be noted that this analogy, as well as the analogies to *Wisconsin v. Yoder* and to *Stanley v. Georgia*, involve important aspects of the First Amendment. Since First Amendment rights are not merely "personal" rights, but are particularly vital to the proper functioning of our governmental system, these rights have been given the utmost protection by this Court. Nonetheless, as these analogies show, governmental influence in furtherance of legitimate interests of State is constitutionally permissible. *A fortiori*, governmental actions that may influence the abortion decision (which is not directly protected under the First Amendment, but only as an aspect of the right to privacy) are constitutionally valid.

To advance their unconstitutional conditions argument Plaintiffs offer two analogies which, they claim, parallel the issues in this case:

If Illinois had a scholarship program for study of any foreign language but made German ineligible, or subsidized chemistry training at all private schools, except Catholic ones, the actions would be analogous to what the state has done here. And those actions would also clearly constitute unconstitutional penalties.

Brief of Plaintiffs-Appellees at 49-50.

In a footnote they offer a third analogy, claiming that "if Illinois provided transportation to the polls for any voter except those wishing to vote for a particular candidate," such a situation would closely parallel the circumstances of this case. Brief of Plaintiffs-Appellees at 50 n.

In order to claim that the failure to fund abortions when other procedures are generally subsidized places an unconstitutional condition on the right to privacy that includes abortion, Plaintiffs suggest that the failure to subsidize chemistry training in Catholic schools when such subsidies are generally provided to private schools would penalize the right recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Plaintiffs' analogy is not applicable here. Even if it were, the situation they hypothesize would not trigger strict scrutiny.

First, the abortion funding limitations do not provide funding of an item for some, but not for others (as to all but Catholics, to follow Plaintiffs' analogy). Were this the case, an equal protection and not a due process issue would be raised. Even under equal protection analysis, the state action in Plaintiffs' suggested analogy would not be unconstitutional. In it, there is no impingement or burden on a fundamental right, as Plaintiffs apparently claim there is. Under Plaintiffs' hypothetical fact situation, al-

though the decision to go to a non-Catholic private school to study chemistry may have been made "a more attractive alternative, thereby influencing the . . . decision, [the State] has imposed no restriction on [access to chemistry study] that was not already there," to paraphrase *Maier v. Roe*, 432 U.S. at 474. As the *Maier* Court concluded, "[T]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475. Thus, so long as there were a rational basis for the distinction (for example, that the State wished to avoid furthering an Establishment of Religion to any degree), subsidizing chemistry training at all non-private schools except Catholic ones would be constitutional.*

The same analysis is applicable to Plaintiffs' analogy concerning the exclusion of instruction in German from a scholarship program of study of foreign languages. Moreover, unlike Catholics or non-Catholics who as "persons" have constitutional rights which would subject their exclusion to equal protection scrutiny, the subject of "German," which is not a "person" under the Fourteenth Amendment, has no constitutional right which would be infringed by its exclusion.

Indeed, Plaintiffs' claim that for the State to provide funds for all languages except German would place an unconstitutional condition or penalty on the right recognized in *Meyer v. Nebraska*, 262 U.S. 390 (1923), is directly contrary to this Court's holdings in *Meyer* and *Maier*.

* If there existed other equally religious schools which were subsidized, the distinction might be unconstitutional in the absence of another relevant logical distinction between Catholic and other religious schools—but if so, it would be unconstitutional under the rational basis test, not because there was any fundamental right impinged.

The power of the State to "prescribe a curriculum" in its educational programs which might exclude German language instruction "is not questioned." *Meyer v. Nebraska*, 262 U.S. at 402; *Maier v. Roe*, 432 U.S. at 464.

The Plaintiffs' analogy of a governmental program which provides funds for transportation to the polls for all except those who wish to vote for a particular candidate is similarly defective. Those who wish to abort are not excluded from the medicaid program or any part of it; the State merely fails to fund a certain *type* of medical assistance under the laws before this Court. In other words, with respect to assistance provided under medicaid, every eligible person is treated equally. Following the Plaintiffs' analogy, under the laws before this Court it is as though the State had a program to subsidize the bus fares of all who wished to vote, but failed to pay for taxi fares—a policy which would certainly not impinge a fundamental right and which, so long as supported by a rational basis (*e.g.*, fiscal constraints), would be constitutional.

Thus, neither the laws before this Court nor the analogies suggested by the Plaintiffs involve a burden or an impingement on a fundamental right. Unless this Court is willing to hold that mere "influence" triggers strict judicial scrutiny, all would have to be reviewed under the rational basis test.

Plaintiffs' claim that the Hyde Amendment and the Illinois law impinge the substantive due process rights of women who wish to abort finds no support in logic or in the prior decisions of this Court. It must be rejected.

B. A Belief of Some Legislators That the Fetus Is "Actual" Rather Than "Potential" Human Life Cannot Invalidate the Enactments

Plaintiffs frequently suggest to this Court that the Hyde Amendment and its Illinois counterpart are invalid because the proponents of the statutes believed that the human fetus is "actual human life" as opposed to "potential human life." Plaintiffs even suggest that if the State of Illinois knew that the fetus was only "potential life," rather than "actual fully developed human life, a misconception which alone explains the irrationality and cruelty of the Illinois Statute" (Brief of Plaintiffs-Appellees at 50, 51), the statute would not have been enacted. Yet this Court in *Maier*, as well as in every other abortion case which has come before this Court, has acknowledged the State's important and legitimate interest in "potential human life." See *Colautti v. Franklin*, 439 U.S. 379 (1979); *Beal v. Doe*, 432 U.S. 438, 446 (1977); *Maier v. Roe*, 432 U.S. 464, 472 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 423 U.S. 52, 61 (1975); and *Roe v. Wade*, 410 U.S. 113, 162 (1973).

It would be absurd to declare an otherwise constitutional statute unconstitutional because some, or even a majority, of those who supported the legislation believed that abortion funding limitations protected an "actual" human life rather than a "potential" one. In effect, Plaintiffs argue that, had the legislature "correctly" viewed the product of human conception as "potential human life," the statute would be valid—or at least not subject to strict judicial scrutiny—but that this mere "misconception" transforms the issue in such a fashion that strict scrutiny must be involved. The principle of law which Plaintiffs ask this Court to adopt is that, even if legislative action was directed to a legitimate state interest and rationally furthers that

interest, it must nonetheless be invalidated if the legislators used what a court considers "poor reasoning" or "misconceptions" in enacting the law.

The irony of Plaintiffs' argument in the context of an abortion case is that they thereby ask this Court to adopt one of several theories of life, while this Court in *Roe v. Wade* has clearly recognized "the wide divergence of thinking on this sensitive and difficult question [of when life begins]." *Roe v. Wade*, 410 U.S. at 159, 160. Just as Texas could not "by adopting one theory of life . . . override the rights of the woman at stake," *Roe v. Wade*, 410 U.S. at 162, the judiciary should not "by adopting [a different] theory of life . . . override the [important and legitimate interests of the federal government and the State of Illinois]." *

The Plaintiffs' claim that the Hyde Amendment and the Illinois law should be stricken because some legislators may view the fetus** as "actual" human life finds no basis in law or in reason and must be rejected.

* There is a further irony in Plaintiffs' argument. On the one hand, they claim that the Hyde Amendment and its Illinois counterpart are invalid because they influence and thus "penalize" the thought and decision-making process of pregnant women facing an abortion decision. On the other hand, they ask this Court to penalize the expression of beliefs of legislators and citizens by invalidating otherwise valid enactments solely because the Plaintiffs disagree with the views expressed by some of those enacting it.

It must be noted that the Plaintiffs' claims against Illinois in this regard, as well as in relation to the Medicaid Title, raise serious questions under the Tenth Amendment. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

** This Court has held that the State has a "direct interest in the protection of the fetus" (*Maier v. Roe*, 432 U.S. at 478 n.11), regardless of how the fetus is characterized. In any case, Intervenor (footnote continued)

III. Plaintiffs' Statutory Arguments Are Without Merit

Just as the Plaintiffs apparently hope that this Court will ignore the constitutional principles set forth in *Maher*, they also apparently hope it will ignore the basic statutory standard set forth in *Beal v. Doe*, 432 U.S. 438, 444 (1977), that state coverage determinations under the Medicaid Act "be 'reasonable' and 'consistent with the objective of the [Title].'"

They do so both by arguing that 42 U.S.C. § 1396a(a)(17) (1976), which contains the language on which *Beal* relied, does not apply, and by maintaining that other sections of the Act impose an obligation on the States to fund all "medically necessary" items within five mandated categories. They are wrong on both counts.

A. 42 U.S.C. § 1396a(a)(17) (1976) Establishes That Participating States May Specify What They Cover Within the Five Mandated Categories So Long as These Specifications Are "Reasonable" and "Consistent With the Objectives" of the Title.

In order to avoid the plain language of 42 U.S.C. § 1396a(a)(17) (1976) ("A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title]"), Plaintiffs resort to legislative history in an attempt to argue that the section applies to "eligibility" rather than to the "extent of medical assistance." Brief of Plaintiffs-Appellees at 75.

(footnote continued)

point out to this Court that considerable scientific evidence is available upon which citizens and legislative representatives could conclude rationally that the product of human conception is both "human" and "living." See, e.g., C. Corliss, *Patten's Human Embryology*, 30 (1st Ed. 1976); L. Arvey, *Developmental Anatomy*, ch. 2, 6 (6th Ed. 1954); L. Shettles, *Ovum Humanum*, 60 (1st Ed. 1960).

It is true that the bulk of the comments in the committee reports on this section relate to eligibility standards. But the reason for this is that the rest of the language in § 1396a(a)(17) relates in some detail to eligibility, and that this additional "eligibility" language was the portion of the section which was new in the 1965 law. As the Senate Finance Committee put it, "The committee bill would make more explicit a provision now in the law that in determining eligibility for and the extent of aid under the plan, States must use reasonable standards consistent with the objectives of the titles." Sen. Rept. No. 404, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1943, 2018. What the bill was expanding upon was the eligibility aspect—not the extent of assistance aspect—of the then current language. Naturally, the report's language concentrated on what was being changed. The comparative silence of the Committee about the *extent* of assistance aspect supports the inference that it was satisfied with that language and the construction given to it as it existed in the then-current law, enacted in 1960. 74 Stat. 924. At the time of its passage, the Senate Finance Committee commented, "Each State may determine *for itself* the scope of medical services to be provided in its program." Sen. Rept. No. 1856, *reprinted in* 1960 U.S. Code Cong. & Ad. News 3610-3614 (emphasis added).

Indeed, Plaintiffs' next argument that the section "governs the terms under which optional services are to be provided (Brief of Plaintiffs-Appellees at 77) is inconsistent with their claim that the section applies only to eligibility standards.*

* Neither the United States (which generally argues on behalf of Plaintiffs' statutory position) nor the Amici supporting Plaintiffs' position agree that the provision applies only to eligibility. Brief for United States at 144; Amicus Brief of *Roe et al.* at 17; Amicus Brief of Physicians' National Housestaff Association *et al.* at 33-36. Indeed, the latter brief specifically attacks such a construction, pointing out that §1396a(a)(17) constitutes the statutory basis for regulations governing the extent of assistance. *Id.* at 35.

Plaintiffs' position that the authority granted to the States to make decisions about the extent of coverage so long as they are reasonable and consistent with the objectives of the Title applies only to optional and not to mandatory categories is demonstrably wrong.

Mandatory categories apply with regard to "individuals receiving aid or assistance under any plan the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter," as the Title defines the "categorically needy." 42 U.S.C. §1396a(a)(13)(B) (1976). Coverage is optional with regard to "individuals not included" in this description (those who are "medically needy"). 42 U.S.C. § 1396a(a)(13)(C) (1976).

In 42 U.S.C. § 1396a(a)(17) (1976), the full text of which is reprinted below,* the "reasonable standards"

* A State plan for medical assistance must:

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, *but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter* based on variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the appli-

(footnote continued)

and "consistent with the objectives" language is stated in terms generally applicable to the whole Title without any limitation to optional categories. It is significant that *in the same sentence* there are two parenthetical clauses which, with reference to particular specifics, qualify the general "reasonable standard" requirement to apply *only* to the medically needy (using the precise statutory description of that class), and that there is a subsection (D) which imposes specifics applying *only* to a subclass of the categorically needy (the "blind or permanently totally disabled" under Title XVI). This illustrates the particularity with which §1396a(a)(17), like the rest of

(footnote continued)

cant or recipient and (*in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter* as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 of (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law [*sic*]. 42 U.S.C. § 1396a(a)(17) (1976) emphasis added).

the Title, is drafted. Indeed, the entire Social Security Act is a highly technical statute drafted with careful precision. When Congress means that a particular provision applies only in certain instances, it explicitly so provides. The "reasonable standards" provisions, lacking such a qualification, applies to mandatory as well as to optional categories of assistance.

B. The Statute Does Not Support the Claim That States Must Fund All "Medically Necessary" Items

The Brief for the United States at 44, and Amici Roe *et al.*, Brief at 16, cite the Medicaid Title's Preamble for the proposition that the Title requires funding of all "medically necessary" items, and Plaintiffs appear to rely on the same assumption. Brief of Plaintiffs-Appellees at 79 n., 84. To the extent Plaintiffs do so, their position is inconsistent with their Brief's statement that, "[T]he preamble . . . language in the public assistance titles of the Social Security Act has never acted as either a sword for recipients or a shield for the states; it modifies neither minimum eligibility nor minimum assistance provisions." Brief of Plaintiffs-Appellees at 77-78. We could not have said it better ourselves.

Even if the Preamble language had substantive impact in preference to the specific substantive provisions of the Title, it would not support such a requirement, since the term "necessary medical services" refers only to a description of those eligible ("individuals, whose income and resources are insufficient to meet the costs of necessary medical services," 42 U.S.C. §1396 [1976]), not to the *extent* of the "medical assistance" it is the intent of the Title "to furnish." *Id.* See generally, Brief of Intervening Defendants-Appellees, *Harris v. McRae*, No. 79-1268, at 69-71.

Plaintiffs' principal reliance is on the requirement of §1396a(a)(13)(B) (1976) that State must provide, with regard to the categorically needy, for the "inclusion of at least the care and services" listed in §§1396d(a)(1)-(5). Brief of Plaintiffs-Appellees at 73. Certainly this language justifies the conclusion that the States must include the five specified categories, but, as this Court held in *Beal*, it "does not require States to provide funding for all medical treatment falling within the five general categories." *Beal v. Doe*, 432 U.S. at 441. The Senate Finance Committee report indicates that it was intended that the States cover "some," not necessarily all, care in a general mandated category. See Brief of Intervening Defendants-Appellees in *Harris v. McRae*, at 76; see generally, *id.* at 72-76.

Plaintiffs apparently recognize that their reading would render superfluous the requirement of 42 U.S.C. §1396a(a)(13)(A)(i) (1976) that each State plan "provide . . . for the inclusion of some institutional and some noninstitutional care and services," and so they refer to H.R. Rep. No. 213, 89th Cong. 1st Sess. 9-10, 70 (1965), which states, "Under existing laws the State must provide 'some institutional and some noninstitutional care' The bill would require that by July 1, 1967 [the States cover the mandatory services listed in 42 U.S.C. §§1396d(a)(1)-(5)]. . . . [U]ntil then, the State plan must include . . . some institutional and some noninstitutional services." But in 1968 Congress repealed other transitional language in §1396a(a)(13), and left the "some institutional and some noninstitutional" requirement intact. Pub. L. 90-248, § 224(a), 81 Stat. 902 (1968). This 1968 decision may have something to do with the increasing sense that the movement toward comprehensiveness of coverage originally contemplated to be complete by 1975 (Brief of Defendant-Appel-

lant Miller at 46-47 n. 25) was seen to be "wreaking such fiscal havoc on" the States (Amicus Brief of Physicians' National Housestaff Association *et al.* at 22) that such a goal was less likely to be reached. In the next year, 1969, the comprehensive deadline was extended for two years, *id.* at 22 n. 29, and by 1972 the goal was repealed entirely. See Brief of Defendant-Appellant Miller at 47 n.25. In this context, Congress may well have felt it important to ensure that the States maintain the minimum of some institutional and some noninstitutional care in each mandated category. In any case, the provision which ensures that some minimum institutional and noninstitutional care be provided was clearly not regarded as superfluous after 1967—as, under Plaintiffs' theory, it necessarily would be since a requirement that all "medically necessary" items be funded would subsume *all* institutional and *all* noninstitutional care.

The Brief for the United States at 44, joined by the Plaintiffs, Brief of Plaintiffs-Appellees at 85, 88, argues that Illinois violates the regulatory provision, "The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition," 42 C.F.R. §440.230(c)(1) (1979). Excluding abortions not necessary to preserve maternal life, the United States argues, "would constitute a denial of payments based solely on diagnosis (*i.e.*, that an abortion is medically necessary) and condition (*i.e.*, pregnancy)." Brief for the United States at 44.

But the United States utterly ignores its own regulatory definition of diagnosis as a procedure "to identify the existence, nature or extent of illness, injury, or other health deviation. . . ." 42 C.F.R. §440.130(a) (1979). A "diagnosis," therefore, identifies the health problem. *It does*

not define the manner of treatment. "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States . . . is bound to respect and enforce it." *United States v. Nixon*, 418 U.S. 683, 695 (1974).

Plaintiffs also argue that "refusal to meet particular needs of particular individuals comes only through exclusion of services to treat those needs." Brief of Plaintiffs-Appellees at 88. But this assumes that the State does not fund alternative treatments which meet those needs. Failure to fund abortion, when effective alternatives are available and funded, does not discriminate on the basis of the "condition" of pregnancy—or on the basis of the diagnosis of a pregnancy complication. Plaintiffs suggest that such alternative treatment may fail to be funded, since some elements of it (*e.g.*, drugs) are in optional service categories. But Illinois covers the relevant optional categories. Brief of Plaintiffs-Appellees at 72. Only if Illinois altered this practice and ceased to fund treatments for pregnancy complications alternative to abortion would Plaintiffs' point be relevant to whether a violation of the regulation is involved in abortion funding limitations. Amici Physicians' National Housestaff Association, *et al.*, admit, "A state could properly . . . provide podiatrist's care for certain services because it is cost-efficient while restricting its availability for others, provided that medically necessary care is available from either a physician or a podiatrist." Brief at 36, citing *District of Columbia Podiatry Society v. District of Columbia*, 407 F.Supp. 1259, 1265 n.27, 1268 n.43 (D.D.C. 1975). Except that Illinois' primary interest here is its valid concern for the fetus rather than short term fiscal frugality (although long term fiscal interests play a part; see Brief of Intervening Defendants-Appellants at 57-59;

Amicus Brief for the National Right to Life Committee at 19-21), this is precisely what it has done here—it has made “medically necessary care” available for all pregnancy complications, while restricting the funding of an alternative form of treatment which violates important state interests.

Plaintiffs argue that Illinois cannot prefer some treatments over others, relying on 42 U.S.C. §1320c-5(b)(i)’s requirement that Professional Service Review Organizations (PSROs), in developing norms for their evaluation and review, take “into account differing, but acceptable, modes of treatment.” Even if this were relevant (here, of course, Illinois does not regard abortion as “acceptable”), it relates to PSROs and imposes no limitations on the very different role of States. 42 C.F.R. §463.27(c)(3) (1979) provides, “PSRO determinations under the provisions of Title XIX of the Act with regard to issues that are not subject to PSRO determination.” In enacting the regulation HEW explained:

Section . . . 463.27(c) make[s] clear that . . . the States under Title XIX may establish the services that are covered on a uniform basis (scope of benefits). However, to the extent *individual* medical judgments are required to *implement these coverage rules*, it is the PSRO’s responsibility and authority to make these medical judgments which must be followed by the . . . State Medicaid agencies.

43 F.R. 7406 (February 22, 1978) (emphasis added).

With regard to Plaintiffs’ other claims concerning PSROs, see Brief of Intervening Defendants-Appellees, *Harris v. McRae*, No. 79-1268, at 77-84.

Finally, Plaintiffs seek to escape the force of the illegality of most “medically necessary” abortions at the time the Act was passed through the use of two arguments.

First, they equate the *illegality* of abortion with the *unavailability* of subsequently developed drugs and other means of medical treatment. Of course, it was the intent of Congress to fund methods of treatment developed by medical science in the years since the passage of the Medicaid Act. But abortion is not a new procedure developed since 1965—it was well known at the time. It was precisely because it was known at the time that there were laws in force prohibiting it. And it is precisely because it was known at the time that congressional attitudes toward abortion and congressional intentions concerning the funding of abortion can be so easily ascertained. See generally, Brief of Intervening Defendants-Appellees, *Harris v. McRae*, No. 79-1268, at 101-103.

Second, Plaintiffs’ make reference to 42 C.F.R. §440.50(a) (1979), which defines “physicians’ services” as those “within the scope of practice of medicine or osteopathy under state laws.” But this regulation relates, as is clear in the context, to the legally regulated demarcations among the various professionals: *e.g.*, what a podiatrist is permitted to do vis-a-vis an osteopath, or a dentist vis-a-vis a physician. In any case, it surely cannot be held to *require*, as opposed to *allow*, the State to fund every medical practice not prohibited by law, since this would mandate the provision of such things as preventive services and other “medically unnecessary” services.

In sum, the Plaintiffs’ claim that the Medicaid Title requires the States to fund all “medically necessary” abortions is erroneous. It must be rejected.

C. The Abortion Funding Limitations Are Fully In Accord With the State's Valid Interest In Maternal Health As Well As the Purposes of the Medicaid Title.

From a constitutional perspective, it has been clearly demonstrated that abortion funding limitations entail no impingement whatever on any constitutional rights. Therefore, the question of whether the State ought to pursue its important and legitimate interests in maternal health or its important and legitimate interests in fetal life is a matter to be resolved according to the normal democratic process.* From a statutory perspective, Intervenor's recognize that the purpose of the Medicaid program is to promote the State's interest in the health of its citizens. Plaintiffs' claim that the abortion funding limitations are incompatible with this purpose of the Medicaid program. Although, as Intervenor's have shown, the Medicaid program is not so inflexible that it would not permit the States latitude to protect other important interests of the State, even if

* Even assuming for the sake of argument that an increase in the incidence of maternal mortality could be predicted because of the abortion funding limitations, this would not, from a constitutional perspective, preclude the State from promoting its important and legitimate interest in the fetus any more than the statistical certainty that human life will be lost in automobile accidents would preclude the government from commencing the Federal Interstate Highway Project. In short, the authority of the State to promote its interests does not vanish because one can predict statistically some human tragedy. Rather, whether the human cost is or is not disproportionate with regard to an action undertaken to accomplish the legitimate goals of the State is to be determined according to normal democratic processes. This demonstrates, once again, what actually underlies Plaintiff's stated position: they simply do not like the manner in which the Congress and the State of Illinois have assessed the relative importance of what Plaintiffs perceive to be conflicting state interests, and they invite this Court to "second-guess" the legislature.

these interests were incompatible with the State's interest in health (as, for example, a fiscal interest might be), this section will demonstrate that medical treatments alternative to abortion are fully effective and that, therefore, an abortion funding limitation is not incompatible with the health purpose of the Medicaid Act.

Plaintiffs and their supporting Amici maintain that the abortion funding limitations are unreasonable because they harm the State's interest in maternal health while advancing its interest in fetal life. This argument rests, however, upon the assumption that the State, through the Hyde Amendment and the Illinois law, fails to meet the health needs of pregnant women*—that it does not fund adequate alternative treatments. The Brief of Intervenor's Defendants-Appellants (at 70-76), as well as the Amicus Brief of Certain Physicians, Professors, and Fellows in support of the Appellants in this case, shows that there are such

* Plaintiffs' attack on the Hyde Amendment and its Illinois counterpart is based to a great extent on their prediction that limiting funds for abortion to life endangering situations will result in increased mortality of pregnant women. However, this prediction finds little statistical support, as is shown by the report of the Center for Disease Control, Morbidity and Mortality Weekly Reports, Feb. 2, 1979 at 4 (introduced by Intervenor's into the record below), according to which "No increase in abortion related complications was observed in this surveillance project [to determine if there was excess mortality attributable to the Hyde Amendment]."

One problem with the methodology of the Center for Disease Control in conducting this "surveillance" is that it focused on "abortion related complications", whereas the real question is whether there are pregnancy related complications which cannot be treated successfully by medical means alternative to abortion. It is thus more appropriate to examine the effectiveness of alternative treatment to abortion, as is done in the medical literature cited in this Brief.

treatments and that they are effective. In response to the briefs of Plaintiffs and the Amici supporting them, this brief will demonstrate that for each complication of pregnancy cited by our opponents, except for those instances in which the life of the mother would be endangered if the fetus were carried to term, there exists an effective and available treatment alternative to abortion. From this perspective, the funding schemes before this Court harmonize the State's interests in maternal health and in fetal life.

The following table summarizes each complication of pregnancy and the treatment for it, and it comments on Plaintiffs' understanding of it. Extensive notes referring to available medical literature detail and substantiate each conclusion.

**Chart Setting Forth Effective Medical Treatments
Alternative to Abortion for Diseases
Cited by Plaintiffs***

Diseases Cited By Plaintiffs and Their Amici in the Answer Briefs	Plaintiffs' Elected Treatment for the Disease	Treatment Recommended in the Medical Literature	Intervenors' Response to Plaintiffs' Claims
Cardiac Disease (See Planned Parenthood Federation et al. at 14)	Abortion	Decrease cardiac work via ¹ 1. Rest 2. Reassurance 3. Medication	1. Plaintiffs' own claim. ^{2, 3} 2. Not supported by cited literature. ⁴ 3. Plaintiffs' proposed treatment presents significant risk. ⁵

* To preserve the continuity and readability of this Chart, all footnotes are set forth in a separate Appendix attached to this Brief.

Diseases Cited By Plaintiffs and Their Amici in the Answer Briefs	Plaintiffs' Elected Treatment for the Disease	Treatment Recommended in the Medical Literature	Intervenors' Response to Plaintiffs' Claims
Sickle Cell Anemia (See Planned Parenthood Federation et al. at 16)	Abortion	1. Prevention of infection 2. Prevention of crises 3. Maintenance of adequate hematocrit & hemoglobin. ⁶	1. Plaintiffs assume non-treatment of women which is not consistent with good medical practice. ⁷
Cancer (See Planned Parenthood Federation et al. at 16; Plaintiffs-Appellees at 63)	Abortion	1. Treatment not altered due to pregnant state. ^{8, 9, 10} 2. Pregnancy does not affect or worsen cancerous state. ¹¹	1. Plaintiffs cannot justify a delay in cancer treatment. ^{12, 14} 2. Evidence indicates abortion may do more harm than good. ¹³
Hypertensive Disorders (See Planned Parenthood Federation et al. at 17; Plaintiffs-Appellees at 10)	Abortion	Treat Hypertension using 1. Bed rest 2. Changes in diet, lifestyle 3. Anti-hypertensive drugs. ¹⁵	1. Plaintiffs' own citations dispute claims. ¹⁶ 2. Studies show no treatment failure. ¹⁷
Renal Disease (See Planned Parenthood Federation et al. at 19)	Abortion	Treatment not altered due to pregnant state. ¹⁸	1. Renal clearance often improves in pregnancy. ¹⁹ 2. Sole exception funded under "life of the mother" standard. ²⁰

Diseases Cited By Plaintiffs and Their Amici in the Answer Briefs	Plaintiffs' Elected Treatment for the Disease	Treatment Recommended in the Medical Literature	Intervenors' Response to Plaintiffs' Claims
Diabetes (See Planned Parenthood Federation <i>et al.</i> at 19; Plaintiffs-Appellees at 10)	Abortion	Control of Diabetes by regulating diet, insulin, physical activity and daily stress. ²¹	1. Authorities cited by Plaintiffs admit the inadequacies of cited studies and present contradictory evidence in support of Appellants. ²²
Venous Disease (See Planned Parenthood Federation <i>et al.</i> at 20)	Abortion	Treatment is elective for varicose veins. Other venous disease treated using anti-coagulant therapy. ²³	1. Abortion is a more dangerous treatment. ²⁴ 2. Efficacy of treatment not disputed. ²⁵ 3. Medical literature does not support Plaintiffs. ²⁶
Psychiatric Factors (See Planned Parenthood Federation <i>et al.</i> at 21)	Abortion	Psychiatric treatment not affected by pregnancy. ²⁷	1. Plaintiffs do not cite medical literature since no support for their claim exists. ²⁷ 2. Every psychiatric indication for abortion is an indication against. ²⁸
Teenage Pregnancy (See Planned Parenthood Federation <i>et al.</i> at 22)	Abortion	Proper prenatal care including psychological and nutritional education. ²⁹	1. Plaintiffs' assumptions are based on no prenatal care. 2. Risks of abortion and complications of abortion are serious and not considered by Plaintiffs. ³⁰

In view of the lengthy and somewhat complicated treatment given by both sides to the medical issues, this Court might be tempted to conclude that it has no competence to resolve medical disputes, and that deference is required to the viewpoint of the attending physician. But the foregoing chart and its supporting notes demonstrate that the crux of the issue between the parties on the factual question of adequacy of alternative treatment is not really one of differing medical analysis at all. Both sides ultimately agree that effective alternative treatments exist.* Plaintiffs and their supporting Amici refer, however, to the model of the "uncooperative woman." Specifically, Plaintiffs argue that, if the woman does not cooperate with these alternative treatments, the State harms her health by refusing to provide an abortion. Thus, although on the surface it may appear that this issue is of great medical complexity, in reality the only issue on which there is a genuine dispute is the significance of the woman's failure to cooperate.

Surely the State does not act unreasonably by refusing to provide funding for a procedure destructive of important state interests when 1) the State offers adequate and effective alternative treatment for all diseases complicating pregnancy, and 2) the pregnant woman refuses to cooperate with the alternative treatment, to the detriment of her health.

The State does not act unreasonably with regard to its interest in maternal health merely because it does not accommodate itself to the attitude of the woman. See Reply Brief of Intervening Defendants-Appellees, *Harris v. McRae*, No. 79-1268, at 2-4. Illinois fully meets the health

* The only exceptions relate to a couple of instances in which the problem is related to outdated medical literature (See Appendix, nn. 7, 22) or to a desire to avoid treatment potentially harmful to the fetus (See Appendix, nn. 10, 12, 25). See *esp.* n. 25.

needs of all Medicaid-eligible women for treatment of pregnancy complications which are not voluntarily self-imposed.

In sum, although the abortion funding limitations would be constitutional and legal solely on the basis of the legitimate interest in the fetus, regardless of their maternal health effect, *in fact* the limitations reflect a complementary integration of the State's fetal life interest and maternal health interest, accomodating the ends of both.

IV.

CONCLUSION

Intervening Defendants-Appellants pray this Court to reverse the decision of the District Court holding the Hyde Amendment and Illinois P.A. 80-1091 unconstitutional, and to reverse the decision of the Circuit Court holding that Title XIX of the Social Security Act requires the States to fund abortion to the extent of the Hyde Amendment or to the extent the physician deems "medically necessary."

Respectfully submitted,

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APPENDIX

APPENDIX

¹Throughout their discussion of the medical evidence, Plaintiffs misrepresent the medical facts concerning alternate treatments and neglect to mention selective portions of the complete remedy. Plaintiffs specifically fail to respond to the following measures that decrease cardiac work:

- (1) Elastic support for legs,
- (2) Prophylactic antibiotic therapy,
- (3) Prompt treatment of urinary tract infections and respiratory infections,
- (4) Moderate sodium restriction,
- (5) Oral iron to avoid anemia,
- (6) Frequent visits to cardiologist and obstetrician/gynecologist, and
- (7) Drugs to improve heart function as needed.

The relevant medical literature strongly supports these measures. See, e.g., Ueland, *Cardiovascular Diseases Complicating Pregnancy*, 21 *Clinical Obstetrics and Gynecology* 431 (1978); Ueland, *What's the Risk when the Cardiac Patient is Pregnant*, 13 *Contemporary OB/GYN* 119 (1979); Rovinsky and Guttmacher, *Medical, Surgical and Gynecological Complications of Pregnancy*, 8 (2nd ed. 1965); MacLeod, *Rheumatic Heart Disease in Pregnancy*, 2 *Lancet* 668 (1954); Gorenberg, *Rheumatic Heart Disease, A Controllable Complication of Pregnancy*, 45 *Am. J. Ob. Gyn.* 835 (1943); O'Driscoll, M. K. Coyle and M. Drury, *Rheumatic Heart Disease Complicating Pregnancy*, 2 *Br. Med. J.* 767-68 (1962); C. Burwell, *The Special Problem of Rheumatic Heart Disease in Pregnant Women*, 166 *J. A. M. A.* 153-58 (1958); D. Ian, *Practical Obstetric Problems*, 169-177 (5th ed. 1979); Kahler, *Cardiac Disease, in Medical Complications During Pregnancy* 105 (Burrow & Ferris ed. 1975). See also Amicus Brief of Certain Physicians at 6-8.

App. 2

²Plaintiffs' use of *Medical Complications During Pregnancy* as a resource is an intelligent choice, provided, of course, such a text is not quoted out of context. Plaintiffs fail to take note of several important points stated explicitly in the text. For example, "At the present time termination of pregnancy is rarely recommended or indicated. Gorenberg and Chesley (1953) feel that abortion is unnecessary in patients with rheumatic heart diseases. . . . Conradsson and Werks state that, 'Therapeutic abortion is no longer a realistic choice, since surgical or intensified medical treatment (or both) can carry the patient through pregnancy with reasonable safety'." See Kahler, *Cardiac Disease, in Medical Complications During Pregnancy* 129-130 (Burrow & Ferris eds. 1975).

³Plaintiffs' Amici present a "shopping list" of complications of pregnancy, Amicus Brief of Planned Parenthood Federation of America, Inc. *et al.* at 14n.6, which merely lists the Table of Contents of *Medical Complications During Pregnancy*. The Amici do not claim that any of the listed complications might or would lead to a consideration of a medically necessary abortion. An extensive review of the text indicates that the authors give no indication that such complications should ever be used as justification for a "medically necessary" abortion. See generally *Medical Complications*, *supra* n.2.

⁴Amici Planned Parenthood *et al.* claim that maternal mortality from cardiac disease is decreasing "in part because of the increased availability of abortions." For this proposition they cite *The Merck Manual* 518 (13th ed. 1977) as their sole source. But their citation does not support their claim. It contains no reference at all to abortion availability as an explanation, partial or otherwise, for the trend in reduction of maternal mortality associated with cardiac disease over the past several decades.

The Amici's claim that maternal mortality from cardiac disease is decreasing "in part because of the increased availability of abortions" is not supported by Kahler, who states:

App. 3

Over past decades there has been a progressive decline in maternal mortality so that in recent years the overall mortality rate in pregnant cardiac patients has been less than 1 per cent. This reduction has been due to a number of factors including a better understanding of the cardiovascular adaptations to pregnancy, resulting in more rational management during pregnancy, improvement in medical therapy and surgical treatment of heart disease in general, and some changes in the pattern of heart disease.

Kahler, *Cardiac Disease*, *supra* n.8, at 105. Abortion is nowhere included on Kahler's list.

The statement Amici quote from Pritchard & MacDonald, *Williams Obstetrics* 612-13 (15th ed. 1976) as "cardiac disease is an urgent indication for therapeutic abortion" reads, in its entirety, "Her desire for a child may be a determining factor, but Class III cardiac disease is an urgent indication for therapeutic abortion unless the woman can be hospitalized for the duration of her pregnancy." *Williams Obstetrics* 612-613. Thus, the primary determining factor is the woman's "desire for a child." Only if she is *not* hospitalized do Pritchard and MacDonald assert there exists an indication for abortion. Of course, there is no medical reason why someone cannot be hospitalized. Illinois will pay for such hospitalization. If the woman refuses hospitalization because the pregnancy is unwanted or for some other personal or social reason, this means that the medically appropriate (and fully adequate) treatment has been rejected, not that there is a medical indication for a therapeutic abortion.

⁵See Amicus Brief of Certain Physicians at 8. This Court should note that statistics on abortion mortality are based on a young healthy population, not on a population suffering from cardiac disease. See *Center for Disease Control Abortion Surveillance Annual Summary* (1977) at 3, U.S. Dept. HEW. Abortion mortality can be expected to be higher in the typically older, ill cardiac patient. The risks of any pregnancy termination are not small. See *Medical Complications of Pregnancy*, *supra* n.2, at 936-939.

App. 4

⁶Specific treatment includes:

- (1) Close observation and frequent physician visits,
- (2) Folic acid supplements,
- (3) Transfusions as necessary,
- (4) Avoidance of hypoxia during anesthesia,
- (5) Early delivery should be considered, and
- (6) Manage pain crises with heparin.

Citations to medical literature::

Fiakpui and Moran, *Pregnancy in the Sickle Hemoglobinopathies*, 11 *Journal of Reproductive Medicine* 28 (1973).

M. Barnhart, R. Henry, J. Lusher, *Sickle Cell* 89 (2d Ed. 1976).

Morrison and Wiser, *The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated with Sickle Cell Hemoglobinopathies*, 45 *Obstetrics and Gynecology* 516 (1976).

Horger, *Managing the Patient with Sickle Cell Disease*, 2 *Contemporary OB/GYN* 55 (1973).

Horger, *Hemoglobinopathies in Pregnancy*, 17 *Clinical Obstetrics and Gynecology* 139-143 (1974).

⁷See Amicus Brief of Certain Physicians at 4, 5. Plaintiffs' Amici rely on a 1975 publication and a 1972 publication for the proposition that "[i]n many instances the maternal risk is considered to be too great, and therapeutic abortions are recommended." Amicus Brief of Planned Parenthood *et al.* at 17 n.22. These publications antedate the 1976 publication of clear evidence that a prophylactic partial exchange transfusion successfully manages the problem which constituted the basis for the Amici's recommendations. See Amicus Brief of Certain Physicians at 2 n.14.

App. 5

⁸Neither Plaintiffs nor their Amici dispute the fact that alternate treatments exist and are effective. The claim of Plaintiffs that "the authorities cited do not stand for the proposition that abortions in other than life-preserving situations are not medically necessary," Brief of Plaintiffs-Appellees at 64n., is not supported by any citation. Plaintiffs misrepresent medical authorities by making fallacious claims and attributing them to such authorities. A blatant example of such misrepresentation can be seen in Plaintiffs' claim that, "Some of the authorities in fact recognize the medical advisability of abortion under non-life-threatening circumstances." *Id.* They cite Levine and Colea, *When Pregnancy Complicates Chronic Granulocytic Leukemia*, 13 *Contemporary OB/GYN* 49 (1979) in support of this claim. But Levine and Colea make no such statement in the cited article. In fact, *abortion is never mentioned* in the article. To further embarrass this ill-conceived attempt at medicolegal legerdemain would serve no purpose. Suffice it to say that *none* of the authorities to whom they refer *ever* cite abortion as a treatment for chronic granulocytic leukemia—or for any other disease.

⁹Treatment of Chronic Granulocytic Leukemia includes:

- (1) Frequent visits to hemotologist and obstetrician,
- (2) Complete blood and platelet counts biweekly,
- (3) Busulfan (chemotherapeutic agent), and
- (4) Splenic irradiation as necessary.

Citations:

Levine and Colea, *supra* n.8.

Sheehy, *An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia*, 75 *Am. J. Obstet. Gynecol.* 789 (1958).

App. 6

¹⁰*Carcinoma in Situ*

Treatment:

- (1) punch biopsy, or
- (2) ring biopsy.

Citation:

Ayre and Scott, *Carcinoma in Situ and Pregnancy*, 176 J.A.M.A. 102-105 (April 1961).

Cancer of the Rectum

Treatment:

Colostomy can be done for obstruction during surgery for the cancer. If in treating the cancerous lesion the fetus is lost, this would be an indirect result. Cf. n.25.

Citations:

1. O'Leary and Bepko, *Rectal Carcinoma and Pregnancy*, 84 Am. J. Ob. Gyn. 459-461 (August 1962).
2. Warren, *Carcinoma of the Rectum and Pregnancy*, 45 Br. J. of Surgery 61-67 (July 1958).

¹¹ According to the most recent data the course of breast cancer arising in a pregnant or lactating woman is no different from that in nonpregnant women of the same age or even older.

Medical Complications of Pregnancy, supra n.2, at 738. See also Sheehy, *An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia*, 75 Am. J. Obstet. Gynecol. 789 (1958). There is no evidence that either the developing fetus or the pregnancy resulting from such a developing fetus is cancerous, causes cancer, or aggravates a pre-existing cancer.

App. 7

¹²Patient treatment should not be delayed by concern for fetal life or welfare. Compare Amicus Brief of Planned Parenthood *et al.* at 16. In many cases, treatment can occur during pregnancy. Should fetal loss occur indirectly, due to or as a result of treatment, such treatment would not be considered an abortion but treatment of a physical illness that *would* be paid for by medicaid funds. Cf. n.25.

¹³Plaintiffs neither contest the availability of alternate treatments for cancer, nor the fact that they are effective. They also present no evidence that abortion cures or in any way ameliorates *any* form of cancer. The contrary may actually be the case. In fact, in cases involving acute leukemia, "Interruption of the pregnancy is of no benefit and may hasten the death of the mother." Mulla, *Acute Leukemia and Pregnancy*, 75 Am. J. Obstet. Gynecol. 1285 (1958). "Moreover, the leukemia does not necessarily prevent the patients carrying their pregnancies to term. And, although premature deliveries are frequent, therapeutic abortion is not indicated." *Ibid.* See also R. Lee, C. Johnson, and D. Hanlon, *Leukemia During Pregnancy* 844 Am. J. Ob. Gyn. 455-58 (1962).

Further, statistics supporting abortion as a form of treatment are based on a population that is primarily young and healthy. See U.S. Dep't of HEW, Center for Disease Control, *Abortion, Surveillance Annual Summary* 3 (1977). In all fairness, a young and healthy population cannot be compared with a population requiring cancer chemotherapy or any other form of medical treatment for complications and conditions not related to pregnancy. Any attempt at comparison would be meaningless because of the great discrepancies in patient population.

¹⁴Plaintiffs and their amici are vague and nonspecific with regard to cancer as a criterion for a "medically necessary" abortion. "Let us sum up the situation in cancers by noting that there are at least 100 different types of cancer in humans. . . ." C. F. Herreid, *Biology* 819 (1977). The point, of course, is that any attempt to consider and examine *all* of the different forms of cancer and the effective treatments available for each one would require

several large volumes. Plaintiffs and their Amici fail to present a specific case because either (1) they cannot recall a specific case, or (2) no such instances exist. Abortion is not a treatment for cancer.

¹⁵See Amicus Brief of Certain Physicians at 10.

¹⁶ With the present availability of effective hypertensive drugs there is no reason that blood pressure in each instance cannot be brought to normal. Their proper utilization depends upon the cooperation between the obstetrician and an internist with experience in the treatment of hypertension.

Medical Complications of Pregnancy, supra n. 2, at 86.

Plaintiffs' Amici openly predicate their claim that abortion may be "medically necessary" for preeclampsia upon the notion that the woman may not choose to cooperate with therapy. Amicus Brief of Planned Parenthood *et al.*, at 18-19. But when the State offers to fund fully adequate therapy, and the woman chooses to reject it, the State cannot be said to have failed in its obligations.

¹⁷See Amicus Brief of Certain Physicians at 10; *see also supra* n.16.

¹⁸See Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linaere Quarterly* 11 (1952); Herwig and Jackson, *Renal Disease and Pregnancy*, 92 *Am. J. Ob. Gyn.* 1117-1121 (1965).

¹⁹Plaintiffs cite to Messer, *Medical Indications for Pregnancy Interruption, in Pregnancy Termination* (Sciarras, Zatuchni and Speidel eds. 1979) at 307 who points out that "owing to increased blood flow, compromised renal function will sometimes spontaneously improve during pregnancy."

²⁰Referring to patients with advanced renal disease, Ferris writes, "If renal function and hypertension become worse early in pregnancy, termination is advisable, since there is little likelihood of a successful pregnancy and renal function may be permanently impaired." *Medical Com-*

plications During Pregnancy, supra n. 2 at 34. The symptoms to which Ferris refers would constitute an acute crisis threatening the life of the mother. Such an occurrence would fall under the "life of the mother" exception, would occur early in pregnancy (thus avoiding any of the serious complications of late abortion), and would be funded by the medicaid program.

²¹See Amicus Brief of Certain Physicians at 12.

²²The 1975 authority cited by Amici Planned Parenthood, *et al.*, Brief at 20, points out that the study of diabetic retinopathy by White on which Amici's conclusions rely had a severe deficiency, to wit: "Control data for a matched nonpregnant group were not presented . . ." *Medical Complications During Pregnancy, supra* n.1, at 191. This, therefore, does not allow conclusions to be drawn from the data. The authority further concedes that any evidence of an increased degree of complications is inconclusive. More importantly, there have been developments in the treatment of diabetes since 1975 and 1973, the dates of the only two authorities upon whom Amici reply. Amici Brief of Planned Parenthood Federation *et al.* at 19 n.32, 20 nn.33-37.

During the past ten years, important advances have been made in caring for the pregnant woman with diabetes mellitus. Maternal mortality has been all but eliminated and maternal morbidity has been reduced significantly.

Gabbe, *New Ideas on Managing the Pregnant Diabetic Patient*, 13 *Contemporary OB/GYN* 109 (1979).

Thus, by 1979 it was possible to conclude, "Provided that the patient is well-controlled throughout pregnancy, the diabetic state is not permanently worsened." *Id.* at 191.

²³See Amicus Brief of Certain Physicians at 11, 12.

²⁴Plaintiffs' authority states:

Although the risk is small, particularly in young mothers, thromboembolism occupies relatively greater importance as other causes of maternal mortality (e.g. hemorrhage, sepsis) come under control. Only *abor-*

tion remains a more common cause of mortality, and pulmonary embolism is clearly the leading fatal pulmonary disease associated with pregnancy.

Hume, *Vascular Disease*, in *Medical Complications During Pregnancy*, *supra* n.1, at 155 (emphasis added).

²⁵Plaintiffs do express fear that a hemorrhage may require termination of treatment. But Hume, *supra* n.1, at 161, cites other methods of treatment to deal with such an occurrence.

Plaintiff's Amici state that because treatment may entail a risk to the fetus "an abortion may become medically necessary." Amicus Brief of Planned Parenthood Federation *et al*, at 21. But the risk to the fetus does not increase the risk to the mother. Presumably, the only motive to avoid such risk would be an interest in the fetus. It is a paradox, therefore, to urge this as an indication for an abortion. Even if it is argued that the fetus might be damaged, such an eugenic basis for an abortion is not a maternal health indication and, from the standpoint of an interest in fetal life, the viewpoint that a handicapped life is worse than no life at all is not one which Congress or Illinois are constrained to adopt in their funding policies. Their interest in the life of a handicapped fetus is no less legitimate than that in the life of a healthy one.

Treatments for maternal health which carry an attendant risk to the fetus are not, of course, thereby made "abortions." Thus, such treatments are fully funded.

²⁶Plaintiff Zbaraz's opinion (that abortion may become "medically necessary") is solely his own and is not supported by the medical literature. See Hume, *supra* n.1, at 161. See also Amicus of Certain Physicians at 12.

²⁷"Abortion has no place in the treatment of the mentally ill or, for that matter, in the prevention of mental illness." Brief of Intervening-Defendants Appellants at 74. See also *Psychological Aspects of Abortion* (ed. Mall & Watts, 1979); Sim, *Abortion and the Psychiatrist*, 2 Brit. Med. J. 145-148 (1963).

²⁸*Ibid.* The medical literature demonstrates that any psychiatric factors which might contraindicate pregnancy also contraindicate abortion.

²⁹Studies indicate that proper pre-natal care is the significant factor in teenage pregnancy. Moreover, of the 28,634 live births to teenagers occurring in Illinois in 1978 only one death resulted. This indicates a maternal mortality rate significantly less than the general population, even in the face of inequities alleged by Plaintiffs. The cause of death was not specified. Telephone Interview with Josephine Stock, Illinois Dep't of Public Health, Public Information Office, Springfield, Illinois (April 14, 1980). See also Amicus of Certain Physicians at 4.

³⁰The court should be extremely wary of "medically necessary" abortions for teenagers in light of recent evidence of the gross overprescription of such treatment. Severe, long term complications and handicaps have resulted. See Bulfin, *A New Problem in Adolescent Gynecology*, 72 Southern Medical Journal 967-968 (Aug. 1979).

Nos. 79-4, 79-5, 79-491, and 79-1268

Supreme Court, U. S.

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PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA McRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

*ON APPEALS FROM THE UNITED STATES DISTRICT
COURTS FOR THE NORTHERN DISTRICT OF ILLINOIS
AND THE EASTERN DISTRICT OF NEW YORK*

REPLY BRIEF FOR THE FEDERAL APPELLANTS

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
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In the Supreme Court of the United States

OCTOBER TERM, 1979

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DAVID ZBARAZ, ET AL.

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v.

DAVID ZBARAZ, ET AL.

No. 79-491

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

No. 79-1268

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AND THE EASTERN DISTRICT OF NEW YORK*

REPLY BRIEF FOR THE FEDERAL APPELLANTS

We respond briefly to two constitutional arguments advanced by appellees in *McRae* and to a statutory argument advanced by appellees in *Zbaraz* and apparently joined by appellees in *McRae* (see *McRae* Br. 112).

1. Appellees in *McRae* repeatedly state (*McRae* Br. 115, 123, 127, 128, 140-142) that the Hyde Amendment "imposes a substantial burden" on the exercise of a woman's right to terminate her pregnancy. They also accuse Congress of "affirmatively reaching out to destroy entitlement to essential medical services" (*id.* at 115, 127). By their lengthy discussion of these assertions in the opening portion of the argument section of their brief (*id.* at 113-136, 139-142), appellees may intend to present a constitutional theory different from the equal protection reasoning adopted by the district courts in both *McRae* and *Zbaraz*. Through their references to impermissible burdens and statutory entitlements, appellees may be asserting a due process argument that focuses, not on the distinction between abortion and other medically necessary services, but rather on the right to seek an abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973). Appellees' position appears to be that, completely apart from whether Congress had a rational basis for treating abortion differently from other medical services, Congress had an independent obligation to provide funds for medically necessary abortions so as not to discourage exercise of the right recognized in *Roe v. Wade*. This argument is insubstantial.

Congress has not penalized women who wish to obtain abortions. Women who decide to terminate their pregnancies, whether for medical reasons or otherwise, do not suffer any disability as a result. The present case is thus substantially different from *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), on which appellees heavily rely. Here, Congress has not said that women who obtain abortions will be ineligible to receive medical care in the

future or will lose accumulated seniority rights or will be deprived of some other benefit to which they would otherwise be entitled. Congress has simply refused to pay for the exercise of a pregnant woman's constitutionally protected choice. For due process purposes, the situation is analogous to the government's failure to pay an indigent's interstate bus fares (*Maher v. Roe*, 432 U.S. 464, 474-475 n.8 (1977)) or to provide transportation to the polls on Election Day for voters who cannot get there on their own. The important distinction is that between refusal to subsidize a right's exercise and imposition of some present or future penalty as a consequence of a decision to exercise the right.¹ The former is permissible, and the Hyde Amendment is an example of legislation of that kind. The latter raises serious constitutional problems, but no such government action is at issue in this case.

This Court has explicitly observed that the concepts of "property" and "entitlement," developed in the context of procedural due process, "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). Accord, *Flemming v. Nestor*, 363 U.S. 603, 608-611 (1960). The Court has applied the same standard in reviewing social welfare legislation that withdraws a prior statutory entitlement as it has in reviewing social welfare legislation that extends a benefit to an arguably under-inclusive class. In either case, the only relevant constitutional inquiry is whether Congress had a rational

¹To the extent appellees present a due process rather than an equal protection argument, they apparently contend that Congress would be required to fund medically necessary abortions even in the absence of the Medicaid program. This Court has never held that Congress must expend public funds in order to enable indigents to exercise their constitutional rights.

basis for drawing the lines it did. If the legislative classification is permissible, no independent due process problem is presented. See, e.g., *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Califano v. Jobst*, 434 U.S. 47 (1977).

2. Appellees in *McRae* also contend (McRae Br. 142-150) that the Hyde Amendment is unconstitutionally vague. This argument, too, is without merit. In essence, appellees' submission is that doctors do not understand and cannot implement the Hyde Amendment. Appellees further assert that physicians fear prosecution for erroneous certifications that particular abortions satisfy the Hyde Amendment requirements. The answer is threefold.

In the first place, the vagueness doctrine only applies to punitive statutes. See e.g., *Colautti v. Franklin*, 439 U.S. 379, 390-397 (1979). No version of the Hyde Amendment has ever contained a penalty provision. Moreover, the sanction provision in the Medicaid Act contains a clear scienter requirement. 42 U.S.C. 1396h. Only if a doctor "knowingly and willfully" makes fraudulent claims is he subject to prosecution or other sanctions. Good faith errors are not penalized. See *Colautti v. Franklin*, *supra*, 439 U.S. at 395.

Second, vagueness challenges are ordinarily adjudicated in response to particular factual situations that enable the reviewing court to assess the degree of difficulty encountered in applying the statutory language to a real set of circumstances. Here, although appellees offered testimony concerning various patients for whom physicians were purportedly unwilling to issue a Hyde Amendment certification, there is no evidence that either the physicians or their patients tried to ascertain at the time a Medicaid abortion was sought whether federal or

local administrators of the program would have regarded the procedure as one covered by the language of the Hyde Amendment. Appellees have not offered any evidence concerning the attempted imposition of sanctions for a physician's improper application of the Hyde Amendment standards, and their vagueness argument is therefore premature.

Third, even if the Hyde Amendment were a punitive statute subject to challenge under the vagueness doctrine, it would pass constitutional scrutiny. A statute is not unconstitutionally vague unless "'men of common intelligence must necessarily guess at its meaning.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). This Court has recognized (*id.* at 608) that

"[t]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Physicians routinely assess the varying degrees of risk faced by their patients or posed by alternative methods of treatment. They can certainly make a good faith determination of whether "the life of the mother would be endangered if the fetus were carried to term."

3. Appellees in *Zbaraz* argue vigorously (Zbaraz Br. 99-130) that the Hyde Amendment does not relieve states participating in the Medicaid program of the preexisting obligation to fund all medically necessary abortions.²

²The question of which authority makes the final determination of whether a particular service is medically necessary has not been litigated in these cases and is not currently before the Court.

Accordingly, appellees urge this Court to affirm the judgment of the Illinois district court on statutory grounds, without reaching the constitutional issues.

As we have explained in our opening brief (No. 79-491 Br. 45-49), appellees' statutory argument is faulty because there is no evidence whatever that the Congresses that have enacted the various versions of the Hyde Amendment expected the statute to have the effect of requiring states to provide 100% funding for all medically necessary abortions as a precondition to participation in the Medicaid program. Appellees have collected a great many statements by legislators to the effect that the Hyde Amendment restricts the use of federal funds for abortions (Zbaraz Br. 109-112 & n.*), but that is a tautology. The significant question, which appellees do not adequately address, is what effect the Hyde Amendment's funding restrictions have on state obligations under the Medicaid Act. Despite appellees' best efforts (Zbaraz Br. 123-128), they have been unable to identify any medical service that states must cover as a condition of participation in the Medicaid program and for which the federal government will provide no reimbursement.³ This is hardly surprising in light of the

³Appellees' purported examples of situations in which states must bear the full expense of Medicaid coverage for a particular group of beneficiaries are all readily distinguishable from the present situation. In no case cited by appellees has the federal government refused to fund a particular form of treatment and nevertheless insisted that the states continue to fund that form of treatment. In virtually every instance cited by appellees, the states' obligation to provide funding to a particular group of beneficiaries without federal assistance is a consequence of some other fiscal policy decision made by the state and readily reversible by the state if and when additional federal contribution is desired. Here, by contrast, appellees would leave the states no choice but to withdraw from the Medicaid program or to provide full funding of all medically necessary abortions not covered by the Hyde Amendment. Congress intended no such result.

Medicaid program's fundamental characteristic: cooperative federal-state funding. Neither in 1965, when the Medicaid Act was passed, nor in the years since, during which the Act was amended several times and the Hyde Amendment restrictions were added to HEW appropriations legislation, has Congress suggested that the states must bear the full financial burden of a particular category of medical services as a precondition to the receipt of any federal Medicaid funds.

Appellees in *Zbaraz* rely heavily (Zbaraz Br. 122-123) on the Secretary of HEW's opposition to the 1977 Application for a Stay in *McRae*, but that document does not take the position that appellees attribute to it. The point of the Secretary's filing was not that the Medicaid Act *obligates* participating states to fund services for which federal contribution is not available, but that the Act *does not prohibit* participating states from funding as many medical services as they choose, even if the federal government refuses to finance one or more such services. This interpretation was correct in 1977, and it remains correct today. The corollary is equally true, and it is dispositive of the validity of the Illinois statute at issue in *Zbaraz*. Just as the Medicaid Act does not *prohibit* states from funding services not covered by federal contribution, so it does not *require* them to do so.

For these reasons and the reasons stated in the opening
briefs of the federal appellants, the judgments of the
district courts should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE UNITED STATES
CATHOLIC CONFERENCE AMICUS CURIAE**

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TABLE OF CONTENTS

	Page
IDENTIFICATION AND INTEREST OF THE AMICUS	ii
ARGUMENT	2
CONCLUSION	5

TABLE OF AUTHORITIES

Colautti v. Franklin, 99 S.Ct. 675, 688 (1979)	3
Dandridge v. Williams, 397 U.S. 485	5
Doe v. Bolton, 410 U.S. 172 (1973)	2
Lindsey v. Normet, 405 U.S. at 74	5
Maher v. Roe, 432 U.S. 464 (1977), p. 476	2
Poelker v. Doe, 432 U.S. 519 (1977)	5
Roe v. Wade, 410 U.S. 113 (1973)	2
Williamson v. Lee Optical Co., 348 U.S. 483	5

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**MOTION FOR LEAVE TO FILE BRIEF OF
UNITED STATES CATHOLIC CONFERENCE
AMICUS CURIAE**

The United States Catholic Conference respectfully
moves this Court for leave to file a brief *amicus curiae*
in this case.

IDENTIFICATION AND INTEREST OF THE AMICUS

I.

Identification of the Amicus

The United States Catholic Conference is a non-profit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in This Case

This case affects matters fundamental to our society. It is the conviction of this *amicus* that the Court can only be well served in matters of such wide import when it has assistance from all quarters. Thus, it is a spirit of service which prompts this *amicus* to make this submission.

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**BRIEF OF THE UNITED STATES
CATHOLIC CONFERENCE AMICUS CURIAE**

ARGUMENT

The decisions in the Abortion Cases¹ created an immunity from state interference with the practice of abortion. They did not create an entitlement to benefits. *Maier v. Roe*, 432 U.S. 464 (1977). p. 476. This distinction is crucial because it focuses on the nature of the constitutional question at issue in the instant case. Immunity from state and/or federal prosecution does not in and of itself make abortion an affirmative value to be embraced by society as a whole. However, the decision in the court below in the instant case marks a shift in that abortion is seen as an affirmative good, that is, something that society should encourage by providing resources for it.

The translation of immunity into entitlement is, in the constitutional sense, essentially a legislative matter. Entitlement to draw upon the resources of the public treasury necessarily implies a social commitment to the affirmative value of such expenditures. In fact, common parlance treats support of a given program as willingness to provide financial resources for it. Conversely, financial support is virtual expression of an affirmative value of the thing being supported. There is indeed a social schizophrenia where a society speaks of its lack of affirmative support for a value while at the same time committing economic resources for it.

Regardless of the rhetoric which surrounds the abortion issue, the cold empirical fact is that abortion always involves the taking of human life. In point of fact, this court recognized in *Maier v. Roe*, *supra* the profound nature of policy question centered around

¹ *Roe v. Wade*, 410 U.S. 113 (1973). *Doe v. Bolton*, 410 U.S. 172 (1973).

the abortion issue. Neither the state nor federal legislatures involved in this action have shown any inclination to embrace the practice of abortion as an affirmative social good. In point of fact, the federal government's limitation of federal expenditures occasioned by the "Hyde Amendment" and the action of the Illinois legislature at issue here manifest a social policy which does not favor the practice of abortion. The lower court herein has acted to displace the policy judgment made by the legislatures involved. In effect, that court seeks to create a legal entitlement and award the practice of abortion the status of an affirmative public good.

The court below has held that the state lacks a rational interest in preserving the life of a nonviable fetus. In doing so, the court linked its "approach" to the decision in *Colautti v. Franklin*, 99 S.Ct. 675, 688 (1979). First, we would point out that the court's decision in *Colautti* is simply inapposite with respect to the instant case. As we noted above, the Abortion Cases provide an immunity from prosecution and interference by the state. Those decisions do not mandate an entitlement to benefits. The *Colautti* case dealt with a statute seeking to control and limit the actual practice of abortion, and the decision in that case dealt with viability solely in the context of the direct limitation of the abortion itself. *Colautti* plainly has nothing to do with the state's interest in using its financial resources to support this practice. Thus, it is clear that *Colautti* never held that government lacks a legitimate interest in the life of a nonviable fetus.

This *amicus* directly challenges the major predicate of the decision below. It is our position that the state has a legitimate interest in the life of an unborn child

worthy of the state's affirmative support regardless of the stage of maturity of the child.

To be sure, it is the position of this *amicus* that the right to life is explicitly protected in the Fifth and Fourteenth Amendments; and, by the penumbral process, this protection properly and necessarily should extend to embrace fetal life. A fetus is not a "different being" from a human being. A human being after birth is the "same being" as before; he or she is merely at a different state of development from his or her fetal stage. A human life is a continuum, not a chain of loosely linked segments, and one's existence is assured at the biological level by the same kinds of internal stimuli and reactions throughout one's temporal development. The human element cannot be divorced from *zoos*. There can be no "human" life without human fetal life.

This view obviously places great value in the life of the unborn child. Unfortunately, it is a view not shared by the Court as the Abortion Cases manifest. Having said that, we also take care to note that this Court has never held that nonviable fetal life has no value to society at all. The major predicate of the decision below is that the state can have no legitimate interest in nonviable fetal life. We do not read the Court's opinion in the Abortion Cases or their progeny to go this far. As much as we disagree with the opinions in the Abortion Cases and, indeed, the disagreement of this *amicus* is widely known, it would come as an even greater shock to learn that the state has absolutely no legitimate interest in a nonviable human fetus.

Clearly, the state has such a legitimate interest. The question posed by the practice of abortion is the value

of human life itself. The right to take a life has always been presumed to be a public right, exercised only under the most rigid rules of due process. The legislature has, we believe, constitutional authority to make the decision that government will not pay to have human life destroyed.

The decision with respect to the expenditures of public funds is a matter properly within the ambit of the will of the public as expressed through the political process. *Poelker v. Doe*, 432 U.S. 519 (1977). Moreover, this court has repeatedly held that such legislation which allocates the disbursal of limited public funds is given wide latitude under our constitutional system. *Lindsey v. Normet*, 405 U.S. at 74; *Dandridge v. Williams*, 397 U.S. 485; and *Williamson v. Lee Optical Co.*, 438 U.S. 483.

CONCLUSION

The holding of the Court below misapplies the decision in *Colautii v. Franklin*. Moreover, its treatment of fetal life is not warranted by the holding in the Abortion Cases or their progeny. Since the major predicate of the Court's decision is erroneously taken, it is clear that the decision must be reversed.

Respectfully submitted,

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MOTION OF THE WASHINGTON LEGAL
FOUNDATION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE,
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January 9, 1980

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MOTION OF THE
WASHINGTON LEGAL FOUNDATION
FOR LEAVE TO FILE A
BRIEF *AMICUS CURIAE*

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceedings.

(i)

(ii)

Consent to the filing of the brief has not been obtained from counsel for Jeffrey Miller, *et al.*, appellants.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of unborn fetuses and the right of Congress and of the states to promote childbirth. WLF finds that supporting appellants in the instant cases is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in these cases are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon general questions of whether federal and state governments should subsidize most abortions. WLF's sole concern in these cases is to support the right of Congress and state legislatures to take a pro-life position and refuse to assist, except in extreme cases, in the abortion process.

Abortion is one of the most controversial social issues facing America today. Strong emotions have been raised by those opposed to or supportive of the concept of legal abortions. Although abortions have been legalized,

(iii)

debate continues over the wisdom of that action. Much has been written about providing a woman freedom of choice concerning abortions. It is just as significant to permit legislative bodies, as representatives of the people, to choose the extent of their abortion funding. A popular desire to curtail state participation in and encouragement of most types of abortions should not be cast aside lightly. WLF seeks to defend expressions of this desire, such as the Hyde Amendment, from constitutional attack.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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January 9, 1980

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	(v)
INTERESTS OF <i>AMICUS CURIAE</i> , THE WASHINGTON LEGAL FOUNDATION, INC.	1
ARGUMENT:	
I. Illinois Is Permitted by the Medicaid Title of the Social Security Act To Restrict Funding of Abortions to Extremely Limited Circumstances	3
II. The Illinois General Assembly and the United States Congress May Limit Funding for Abortions Without Violating the United States Constitution	9
A. The constitutionality of the Hyde Amendment and the corresponding Illinois statute should be reviewed under the rational basis standard	9
B. Preserving fetal life constitutes the most important rational basis for a legislative statutory preference	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

<i>Association of American Physicians & Surgeons v. Weinberg</i> , 395 F.Supp. 125 (N.D. Ill.), <i>aff'd</i> , 423 U.S. 975 (1975)	13
<i>Beal v. Doe</i> , 432 U.S. 438 (1977)	5, 6, 7, 8, 17
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1976)	12
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	12
<i>Coe v. Hooker</i> , 406 F.Supp. 1072 (D. N.H. 1976)	8
<i>D— R— v. Mitchell</i> , 456 F.Supp. 609 (D. Utah 1978)	5, 6, 7, 8, 10, 15, 16, 18
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	5, 14, 15
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	12

Cases, continued:	Page
<i>Doe v. Mundy</i> , 441 F.Supp. 447 (E.D. Wis. 1977)	13
<i>Helvering v. Davis</i> , 301 U.S. 619 (1937)	15
<i>Legion v. Richardson</i> , 354 F.Supp. 456 (S.D. N.Y.), <i>aff'd</i> sub nom. <i>Legion v. Weinberger</i> , 414 U.S. 1058 (1973)	14
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972)	15
<i>Lindsley v. Natural Carbonic Gas Co.</i> , 220 U.S. 61 (1911) . . .	14
<i>Maher v. Roe</i> , 432 U.S. 464 (1977) 10, 11, 12, 13 14, 15, 16, 17, 18	
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	14
<i>Mathews v. de Castro</i> , 429 U.S. 181 (1976)	14, 15
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	14
<i>Planned Parenthood of Central Missouri v. Danforth</i> , 428 U.S. 52 (1976)	12
<i>Poelker v. Doe</i> , 432 U.S. 519 (1977)	12, 17
<i>Preterm, Inc. v. Dukakis</i> , 591 F.2d 121 (1st Cir.), <i>cert.</i> <i>denied sub nom. Preterm v. King</i> , — U.S. — (1979)	8
<i>Richardson v. Belcher</i> , 404 U.S. 78 (1971)	13
<i>Roe v. Casey</i> , 464 F.Supp. 487 (E.D. Pa. 1978)	8
<i>Roe v. Ferguson</i> , 515 F.2d 279 (6th Cir. 1975)	7
<i>Roe v. Norton</i> , 522 F.2d 928 (2d Cir. 1975)	7
<i>Roe v. Wade</i> , 410 U.S. 113 (1973) 3, 6, 7, 8, 10, 12	
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	10
<i>Vance v. Bradley</i> , 439 U.S. 907, 99 S.Ct. 939 (1979)	14
<i>Washington v. Confederated Bands & Tribes</i> , 439 U.S. 463, 99 S.Ct. 740 (1979)	14
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	14
<i>Williamson v. Lee Optical of Oklahoma, Inc.</i> , 348 U.S. 483 (1955)	15
<i>Woe v. Califano</i> , 460 F.Supp. 234 (S.D. Ohio 1978)	12, 13, 17

Cases, continued:	Page
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978)	12
<i>Zbaraz v. Quern</i> , 596 F.2d 196 (7th Cir.), 469 F.Supp. 1212 (N.D. Ill. 1979) 8, 10, 11, 13, 14, 16	
Constitution and Statutes:	
45 C.F.R. § 249.10(a)(5)(i) (1979)	6
Labor-HEW Appropriations Act (Hyde Amendment), Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (current version at Pub. L. No. 96-86, § 118 (Oct. 12, 1979)) 4, 8, 9, 10, 13, 14, 16, 18, 19	
P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23 . . .	3, 7, 9, 10 11, 13, 16, 18, 19
§ 5-5	3
§ 6-1	3
§ 7-1	3, 4
Social Security Act of 1965 (Medicaid Act), Title XIX, Pub. L. No. 89-97, 79 Stat. 344, 42 U.S.C. §§ 1396 <i>et seq.</i> (1976) 5, 6, 8, 9, 18	
42 U.S.C. § 1396	6
42 U.S.C. § 1396a(a)(10)	5, 6
42 U.S.C. § 1396a(a)(10)(C)(i)	5, 6
42 U.S.C. § 1396a(a)(13)(B)	5
42 U.S.C. § 1396a(a)(13)(C)	5
42 U.S.C. § 1396a(a)(17)	6
42 U.S.C. §§ 1396d(a)(1)-(5)	5
United States Constituion:	
Fifth Amendment	9, 13
Fourteenth Amendment	9, 15
Miscellaneous:	
Hardy, <i>Privacy and Public Funding: Maher v. Roe as the</i> <i>Interaction of Roe v. Wade and Dañdridge v. Williams</i> , 18 Ariz. L. Rev. 903 (1976)	11, 17

Miscellaneous, continued:

	<u>Page</u>
Norman, <i>Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have to Pay</i> , 9 Loy. U.L.J. (Chicago) 288 (1977)	5, 7
Note, <i>Indigent Women—What Right to Abortion?</i> , 23 N.Y. L. Sch. L. Rev. 709 (1978)	5
Note, <i>Medicaid and the Abortion Right</i> , 44 Geo. Wash. L. Rev. 404 (1976)	5, 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

Nos. 79-4, 79-5, 79-491

JASPER F. WILLIAMS, *et al.*,
Appellants,
v.

DAVID ZBARAZ, *et al.*,
Appellees.

JEFFREY MILLER, *et al.*,
Appellants,
v.

DAVID ZBARAZ, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.

DAVID ZBARAZ, *et al.*,
Appellees.

BRIEF OF *AMICUS CURIAE*,
THE WASHINGTON LEGAL FOUNDATION, INC.

INTERESTS OF *AMICUS CURIAE*,
THE WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the

purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of unborn fetuses and the right of Congress and of the states to promote childbirth. WLF finds that supporting appellants in the instant cases is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in these cases are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon general questions of whether federal and state governments should subsidize most abortions. WLF's sole concern in these cases is to support the right of Congress and state legislatures to take a pro-life position and refuse to assist, except in extreme cases, in the abortion process.

Abortion is one of the most controversial social issues facing America today. Strong emotions have been raised by those opposed to or supportive of the concept of legal abortions. Although abortions have been legalized, debate continues over the wisdom of that action. Much has been written about providing a woman freedom of choice concerning abortions. It is just as significant to permit legislative bodies, as representatives of the people, to choose the extent of their abortion funding. A popular

desire to curtail state participation in and encouragement of most types of abortions should not be cast aside lightly. WLF seeks to defend expressions of this desire, such as the Hyde Amendment, from constitutional attack.

ARGUMENT

I.

ILLINOIS IS PERMITTED BY THE MEDICAID TITLE OF THE SOCIAL SECURITY ACT TO RESTRICT FUNDING OF ABORTIONS TO EXTREMELY LIMITED CIRCUMSTANCES.

The issue of the legality of abortion operations was settled by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). However, the consequences of that decision have led to litigation which continues to this day. Of particular concern to the instant case is the Illinois statute P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23, §§ 5-5, 6-1, 7-1.¹

¹ Those sections provide, in relevant part:

Sec. 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life

[footnote continued]

This statute was enacted by the Illinois legislature in 1977. The act basically provides for the elimination of state medical assistance funding for all Illinois abortions excepting those "necessary for the preservation of the life of the woman" requesting the operation.² The statute was the product of the concern felt by the Illinois legislature (and shared by many state legislatures) over subsidizing an admittedly legal activity (abortion operations) which ran counter to its pro-fetal life orientation.

A national expression of pro-life sentiment has appeared in Congress' approval of the Hyde Amendment to the Medicaid provisions of the Social Security Act.³ The Hyde Amendment was initially enacted in 1977 as a rider

of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

²P.A. 80-1091, ch. 23, § 5-5.

³Labor-HEW Appropriations Act, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (current version at Pub. L. No. 96-86, § 118 (Oct. 12, 1979)). The Hyde Amendment provides that:

None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting

[footnote continued]

to the Department of Health, Education and Welfare budget. Subsequent riders appeared in 1978 and 1979, indicating steady Congressional interest in restricting abortion expenditures.

These cases center around interpretations of the Medical Assistance Program (Medicaid) which was established in 1965 by Title XIX of the Social Security Act.⁴ Medicaid is a joint federal-state medical plan which is operated by the states within federal guidelines. This system of "cooperative federalism"⁵ is designed to provide medical care for the poor. State participation is voluntary but once Medicaid is adopted, the state must care for the "categorically needy" (e.g., the aged or blind) and "medically needy" (individuals deemed to need medical assistance).⁶ The Medicaid funds are employed in a number of categories of treatment; e.g., physician services.⁷

physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

The provision for abortion funding where severe physical health damage would occur to the mother without an abortion was eliminated by Congress in 1979.

⁴Social Security Act of 1965, Title XIX, Pub. L. No. 89-97, 79 Stat. 344, 42 U.S.C. §§ 1396 *et seq.* (1976).

⁵See *Dandridge v. Williams*, 397 U.S. 471, 478 (1970).

⁶Categorically needy persons are described in 42 U.S.C. § 1396a(a)(10) (1976). Medically needy persons are defined in 42 U.S.C. § 1396a(a)(10)(C)(i) (1976).

⁷Definitions are found at 42 U.S.C. §§ 1396a(a)(10); (13)(B); (13)(C); 1396d(a)(1)-(5) (1976). See *D—R— v. Mitchell*, 456 F.Supp. 609, 617 (D. Utah 1978); *Beal v. Doe*, 432 U.S. 438, 440-41 (1977); Norman, *Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have to Pay*, 9 Loy. U.L.J. (Chicago) 288, 293-95 (1977); Note, *Indigent Women—What Right to Abortion?*, 23 N.Y.L. Sch. L. Rev. 709, 716-17 (1978); Note, *Medicaid and the Abortion Right*, 44 Geo Wash. L. Rev. 404, 404-07 (1976).

States have a great deal of discretion in their administration of the Medicaid program. However, there are limits: "(1) the plan or standard adopted by a state must be reasonable; (2) Medicaid funds must be distributed equally and equitably among Medicaid recipients; and (3) the plan or standard must be consistent with the objectives of Title XIX."⁸ A state is allowed to place "appropriate limits" to services provided such as only medically necessary operations.⁹

Title XIX does not use the term medically necessary; instead "necessary medical services" is employed.¹⁰ The goal of the Medicaid program is to enable qualified recipients to receive necessary medical services. *Amicus* contends that the life-endangering abortion funding standard of Illinois is in line with Medicaid's purpose.

Unfortunately, Congress, in the Medicaid Act, did not define what was meant by necessary medical services. Litigation has resulted, including the instant cases, in attempting to reconcile Medicaid's intentions with legislative pro-life sentiments.

After the 1973 *Roe v. Wade* decision, courts grappled with the issue of whether states could, under Medicaid, disallow payments for elective abortions.

The major case dealing with that issue was *Beal v. Doe*, decided by the Supreme Court in 1977. *Beal* dealt with a Pennsylvania regulation eliminating Medicaid funding for non-therapeutic abortions. An examination of Title XIX

⁸*D— R— v. Mitchell*, 456 F.Supp. at 618. See *Beal v. Doe*, 432 U.S. at 444; 42 U.S.C. §§ 1396a(a)(17), (a)(10)(1976); 45 C.F.R. § 249.10(a)(5)(i) (1979).

⁹45 C.F.R. § 249.10(a)(5)(i) (1979). See *D— R— v. Mitchell*, 456 F.Supp. at 617-18.

¹⁰42 U.S.C. § 1396; 42 U.S.C. § 1396a(a)(10)(C)(i) (1976).

by the Court found no requirement that states must fund all abortions. The Court noted, "[a]lthough serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage [which is not the case with the Illinois statute], it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services."¹¹ Exclusion of non-therapeutic abortions had a rational basis in Pennsylvania's interest in promoting childbirth.¹²

The *Beal* Court used the term non-therapeutic to mean the types of abortion operations illegal in the majority of states before *Roe v. Wade*. In these states, abortions were justified only to save the mother's life.¹³ *Amicus* suggests that the words therapeutic and medically necessary mean the same thing. Both describe the only event which will justify Illinois' Medicaid funding.¹⁴ Although some federal courts have used a broad definition of medically necessary to strike down statutes like Illinois'

¹¹*Beal v. Doe*, 432 U.S. at 444-45, 447. See *Roe v. Norton*, 522 F.2d 928, 935-37 (2d Cir. 1975); *Roe v. Ferguson*, 515 F.2d 279, 283 (6th Cir. 1975). The Court also emphasized that Congress, in originally setting up Medicaid in 1965, could not have possibly meant to mean to mandate coverage for non-therapeutic abortions as such operations were unlawful in most states. As late as 1973, over 30 states barred non-therapeutic abortions. *D— R— v. Mitchell*, 456 F.Supp. at 622-23. See also Norman, *supra* note 7, at 299; Note, *Medicaid*, *supra* note 7, at 410-11.

¹²*Beal v. Doe*, 432 U.S. at 445-46.

¹³*Roe v. Wade*, 410 U.S. at 118.

¹⁴See *D— R— v. Mitchell*, 456 F.Supp. at 623.

as a violation of Title XIX,¹⁵ *Amicus* urges that the narrow definition articulated in *Roe v. Wade* and *Beal v. Doe* be continued.

A narrow definition, interchangeable with the term therapeutic, would more adequately describe the results of judicial rulings and Congressional legislation.

The passage of the Hyde Amendment has served to give a fuller indication of Congressional intent concerning the extent of Medicaid funding. The Amendment's narrow view of medically necessary abortion operations is quite like the Court's view of therapeutic operations in *Wade* and *Beal* and should be given significant attention. The fact that the Hyde Amendment was a rider to an appropriations act rather than a direct amendment of Title XIX should not diminish its importance.¹⁶

Judge Anderson observed in the *Mitchell* case:

[T]his court, infers from the above references from the Supreme Court rulings that the restrictive life-endangering standard of the Hyde Amendment under the rules of construction that apply, is the clearest indication of what category of abortions may be covered by the Medicaid Act. At least, it seems evident the Hyde Amendment was not inconsistent with the requirements of Title XIX.

456 F.Supp. at 624.

Title XIX permits Illinois to fund only medically necessary abortion operations. This standard has been shown to be functionally equivalent to the Supreme Court's therapeutic funding requirement. Illinois, then,

¹⁵See *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), cert. denied sub nom. *Preterm v. King*, ___ U.S. ___ (1979); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979); *Roe v. Casey*, 464 F.Supp. 487 (E.D. Pa. 1978); *Coe v. Hooker*, 406 F.Supp. 1072 (D. N.H. 1976).

¹⁶D ___ R ___ v. *Mitchell*, 456 F.Supp. at 624.

may restrict abortion funding to life-endangering circumstances without falling afoul of Title XIX. Illinois did not act arbitrarily in enacting its restrictions. *Amicus* will further discuss the rationale behind the state statute on page 13 of this brief.

II.

THE ILLINOIS GENERAL ASSEMBLY AND THE UNITED STATES CONGRESS MAY LIMIT FUNDING FOR ABORTIONS WITHOUT VIOLATING THE UNITED STATES CONSTITUTION.

Amicus has previously noted that the Illinois statute restricting Medicaid abortion funding does not run afoul of any statutory impediments created by Title XIX of the Social Security Act. Likewise, *Amicus* will demonstrate that neither the Illinois law nor the Hyde Amendment run contrary to either the Due Process clause of the Fifth Amendment or the Fourteenth Amendment's Equal Protection Clause.¹⁷

A. The constitutionality of the Hyde Amendment and the corresponding Illinois statute should be reviewed under the rational basis standard.

Over the course of this century, the Supreme Court has formulated a number of theories to test the constitutionality of particular legislative statutes. One such test involves strict scrutiny of laws regulating suspect classifi-

¹⁷Pertinent portions of each amendment are:

Fifth Amendment: No person should "... be deprived of life, liberty, or property, without due process of law"

Fourteenth Amendment: "... nor shall any State deprive any person of law; nor deny to any person within its jurisdiction the equal protection of the laws."

cations (such as race) and fundamental interests (such as marriage). Only a compelling state interest can survive a strict scrutiny examination by the Court.

Counsel for the original plaintiffs (*Zbaraz, et al.*) in the instant cases have argued that the constitutionality of both the Illinois statute and the Hyde Amendment should be tested with strict judicial scrutiny. This is due to the laws creating a "substantial impediment to poor women's obtaining medically necessary abortions."¹⁸ The fundamental right of women to obtain an abortion is said to be infringed by the elimination of most State and Federal aid. Indigent women are "forced" to have children instead of abortions.¹⁹

However, indigency alone has never been declared to be either a suspect classification or affecting a fundamental right.²⁰ Indigency in an abortion context was examined by the Supreme Court in *Maher v. Roe* in 1977. This case involved a Fourteenth Amendment equal protection attack of a Connecticut regulation which provided for reimbursements for childbirth expenses but not non-therapeutic abortions. The Court upheld the validity of the Connecticut rule.²¹

Justice Powell, in his majority opinion, noted that:

The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund

¹⁸*Zbaraz v. Quern*, 469 F.Supp. 1212, 1217 (N.D. Ill. 1979).

¹⁹*Id.*, at 1216-17.

²⁰See *Maher v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973).

²¹*Maher v. Roe*, 432 U.S. at 470-71.

childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Maher v. Roe, 432 U.S. at 474. *Amicus* stresses that the Illinois statute at issue in *Zbaraz* has much the same impact on an indigent woman as the above discussed Connecticut regulation.

It has been observed that:

The economic limitations upon the procurement of abortion, where they truly exist, are not created by government, but rather by private physicians who demand fee guarantees prior to the surgery As long as the state imposes no barriers to the right, it cannot be obligated to break down private ones To argue that, when a private physician demands payment in advance from his patient, a state which does not meet his demand is using programs "to limit abortions" or to "unlawfully impinge" upon the patient's rights, is to ignore both reality and stare decisis.

Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 Ariz. L. Rev. 903, 911-12 (1976) (footnotes omitted).²²

A woman's decision concerning abortion involves the fundamental right of privacy.²³ Statutes which have

²²See *D—R— v. Mitchell*, 456 F.Supp. at 614.

²³*Roe v. Wade*, 410 U.S. at 152-53.

infringed this declared right have been struck down.²⁴ However, this right is not absolute. At times, the state interest in health and medical regulation will prevail and abortions may be restricted.²⁵ In the area of abortion funding, the Supreme Court has remarked that a woman's right to an abortion (at least before fetal viability):

. . . protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

* * *

. . . There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

Maier v. Roe, 432 U.S. at 473-75 (footnote omitted). In short, where fundamental rights are not involved, "reasonable" state (or federal) regulations are permitted.²⁶

State or federal encouragement of childbirth, through the non-application of Medicaid funds for non-medically necessary or non-therapeutic abortions, does not infringe upon an indigent woman's constitutional right to decide upon an abortion.²⁷ Therefore, the strict scrutiny

²⁴See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

²⁵*Roe v. Wade*, 410 U.S. at 154, 155, 163; *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

²⁶*Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

²⁷*Woe v. Califano*, 460 F.Supp. 234, 235 (S.D. Ohio 1978). Accord: *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

standard of constitutional review is inapplicable to the instant cases. A number of federal cases involving the constitutionality of state abortion funding restrictions and the Hyde Amendment have resulted in the non-application of the strict scrutiny standard, including the District Court in the instant cases.²⁸

Amicus suggests the use by the Court of the traditional equal protection rational basis test. *Amicus* will explain in the following subsection that the Illinois statute and the Hyde Amendment have a rational basis and are constitutional.

B. Preserving fetal life constitutes the most important rational basis for legislative statutory preference.

The rational basis equal protection test requires that a state statute or regulation be "rationally related" to a "constitutionally permissible" purpose," *Maier v. Roe*, 432 U.S. at 478, in order to be constitutionally valid. The test can also be applied to federal laws challenged under the Fifth Amendment's Due Process Clause.²⁹

The Supreme Court has definitively declared that:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

²⁸*Zbaraz v. Quern*, 469 F.Supp. at 1217-18. See, e.g., *Woe v. Califano*, 460 F.Supp. at 235-36; *Doe v. Mundy*, 441 F.Supp. 447, 450-52 (E.D. Wis. 1977).

²⁹*Ass'n of Am. Physicians & Surgeons v. Weinberger*, 395 F.Supp. 125, 141 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975); *Richardson v. Belcher*, 404 U.S. 78, 84 (1971).

Dandridge v. Williams, 397 U.S. 471, 485 (1970). Actions by a legislature will be assumed valid.³⁰ In addition, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

The District Court in *Zbaraz* found that statutory restrictions of abortion funding such as the Hyde Amendment did not serve a rational basis and so were unconstitutional.³¹ *Amicus* urges that legitimate and important state interests do exist which act to justify abortion funding restrictions.

One rational basis for Medicaid abortion funding restrictions lies in the interests of Congress or a state legislature in allocating scarce financial resources. The courts have recognized that legislatures should have wide discretion in determining funding priorities.

Justice Stewart, in a relatively recent opinion, observed:

The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not con-

³⁰See *Wash. v. Confederated Bands & Tribes*, 439 U.S. 463, 99 S.Ct. 740, 762 (1979); *Vance v. Bradley*, 439 U.S. 907, 99 S.Ct. 939, 943 (1979); *Zbaraz v. Quern*, 469 F.Supp. at 1218; *Maher v. Roe*, 432 U.S. at 478; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 316 (1976) (1976); *Mathews v. de Castro*, 429 U.S. 181, 185 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 769-71 (1975); *Legion v. Richardson*, 354 F.Supp. 456, 459 (S.D. N.Y.), *aff'd sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

³¹*Zbaraz v. Quern*, 469 F.Supp. at 1219-21.

fided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering v. Davis*, 301 U.S. 619, 640 [1937]

Mathews v. de Castro, 429 U.S. at 185.

The actions of Congress and the Illinois legislature restricting Medicaid abortion funding are by no means an arbitrary product of the legislative will. Involvement in a controversial subject like abortion does not produce light-hearted or whimsical responses by those elected representatives of the American people.

There are limits to judicial monitoring of legislative conduct. The Court has declared, "the Constitution does not provide judicial remedies for every social and economic ill."³² Nor does the Court anymore employ the Fourteenth Amendment to invalidate state laws which "may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955).³³ We are warned that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams*, 397 U.S. at 487. For those favoring changes in legislative policies towards abortion funding, the proper locus is not the legal system but a resort to the electoral process.³⁴

³²*Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

³³See *Maher v. Roe*, 432 U.S. at 479; *Dandridge v. Williams*, 397 U.S. at 484-85.

³⁴See *D— R— v. Mitchell*, 456 F.Supp. at 626; *Maher v. Roe*, 432 U.S. at 479-80. *Accord: Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 488.

A federal court in Utah, in upholding the constitutionality of the Hyde Amendment and a Utah statute similar to Illinois', emphasized that:

States have wide latitude in the disbursement of their limited funds, and this court cannot compel the State of Utah to provide payment for an indigent woman's exercise of her right to terminate her pregnancy when Utah has chosen by deliberate legislative processes not to do so. Persons in this country have many rights which they may exercise freely in the sense that a government cannot prohibit the exercise of the respective rights. This does not mean, however, that the government has a corresponding duty to *fund* the exercise of that right.

* * *

. . . If the State of Utah, under *Maier*, may make a choice favoring childbirth over abortion and implement that decision through the allocation of public funds, it may do so on any reasonable conditions.

D—R— v. Mitchell, 456 F.Supp. at 615.

A state's economic interest in not funding abortions has been attacked as being irrational. Funding abortions, say these courts, is less expensive than encouraging childbirth.³⁵

However, new studies have provided evidence which can support a fiscal interest in restricting abortions. One scholar has opined:

Abortions do, as a general rule, consume a lesser amount of medical resources than do deliveries. When viewed at the systems level, a different result may be obtained. The cost of a systematic provision

³⁵E.g., *Zbaraz v. Quern*, 469 F.Supp. at 1218-19.

of free abortion may be considerably higher than the cost of a system of free delivery, due to a tendency of low cost abortion to encourage reliance on abortion as a contraceptive, and due to long term complications on future deliveries.

Hardy, *Privacy and Public Funding* at 926-27 (footnotes omitted).

Repeated use of free abortions as a means of contraception and the cost of a substantial number of long term complication abortion cases (who may require future medical treatment) may create significant costs for a state Medicaid program. In addition, abortion operations may represent "a serious drain on medical resources. Domestic hospitals have reported difficulties in providing adequate care for present patients and in preventing personnel fatigue brought on by abortion caseloads. Staff morale has also been a problem." Hardy, *Privacy and Public Funding* at 930-31 (footnotes omitted).

Hence, *Amicus* advocates that economic considerations may be a rational basis to legislatively restrict abortion funding.

Another rational basis, of prime importance, is the state's (or Congress') interest in encouraging childbirth and protecting the potential life of the fetus. The courts have acknowledged this ancient state interest numerous times.³⁶

This interest may be expressed by a jurisdiction in any number of ways. A state (or Congress) may encourage childbirth out of simple pro-life sentiment and a desire to protect fetal life (which is but potential human life)

³⁶E.g., *Woe v. Califano*, 460 F.Supp. at 237; *Maier v. Roe*, 432 U.S. at 478; *Poelker v. Doe*, 432 U.S. at 521; *Beal v. Doe*, 432 U.S. at 446.

in all but the most extreme circumstances. Another factor might be the need to maintain an appreciable population growth rate to ensure economic prosperity or even survival of the human race. These "concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." *Maier v. Roe*, 432 U.S. at 478 n.11. These legitimate state concerns should not be considered terminated merely by the participation of Illinois in the Medicaid program.³⁷

Therefore, *Amicus* maintains that a legislative desire to favor childbirth over abortions in terms of Medicaid funding for the purposes of protecting fetal life and promoting live births forms the rational basis required for upholding a statute's constitutionality.

CONCLUSION

Title XIX of the Social Security Act has established a voluntary Medicaid system operated by states with federal funding assistance. Member states like Illinois may restrict funding to medically necessary operations. As the Title XIX's term "medically necessary" has a similar meaning to the courts' use of "therapeutic operations," this would be the only situation where funding is mandated by the courts. A state may restrict abortion funding to life-endangering situations.

The correct constitutional standard of review for the Hyde Amendment and corresponding Illinois statute is the rational basis test. The strict scrutiny standard is

³⁷See *D___ R___ v. Mitchell*, 456 F.Supp. at 626; *Beal v. Doe*, 432 U.S. at 446.

inapplicable as the statutes' effects on indigent women do not infringe fundamental rights or create a suspect classification through invidious discrimination.

Rational bases for statutes restricting Medicaid abortion funding include economic desires to save public funds, a desire to preserve fetal life and to encourage childbirth.

The pro-life aspects of the Hyde Amendment and Illinois' corresponding statute represent strong state interests which richly deserve the presumption of rationality. By reversing the District Court's decision, this Court is in a position to reaffirm its stand against unnecessary judicial interference with the legislative process. A product of the democratic political system should not be invalidated without a compelling reason, a reason not discoverable in the instant cases.

Respectfully submitted,

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OCTOBER TERM, 1979

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vs.

David Zbaraz, *et al*.

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Arthur F. Quern, *et al*, *Appellants*,

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INDEX

	PAGE
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	1
ARGUMENT:	2
I. <i>Under The Clear Rationale of Maher and Poelker, Neither The Illinois Abortion Funding Restriction Nor The Federal Hyde Amendment is Unconstitutional.</i>	2
A. <i>Maher and Poelker set the Maximum and Minimum Limits to the Range of Constitutionally Permissible Abortion Funding Restrictions.</i>	2
B. <i>Abortion Funding Restrictions, Like the Hyde Amendment, Which Are Limited to Abortions Necessary to Save the Life of the Mother, or in the Case of Pregnancy Caused by Felonious Intercourse, or Where Severe and Long-Lasting Physical Health Damage Would Result if the Fetus were Carried to Term, Fall Squarely Within the Parameters of Constitutionally Permissible Abortion Funding Restrictions.</i> ..	6
C. <i>Abortion Funding Restrictions, Like the Illinois Abortion Funding Restriction, which Subsidize Abortions Only When the Life of the Mother is Endangered, Are Within the Range of Constitutionally Permissible Abortion Funding Restrictions Under the Rationale of Maher and Poelker.</i>	7
II. <i>Responsible State Officials And The Lower Federal Courts Have Relied Heavily Upon Maher and Poelker In Adopting and Upholding Abortion Funding Restrictions Similar To Those Invalidated By The Court Below.</i>	8

	PAGE
A. A Legislative Determination of the Parameters of What Constitutes "Medically Necessary" Abortions in a Medical Assistance Program is Constitutionally Preferable to a Judicial Determination	8
B. The States Have Heavily Relied on the Good Faith of the <i>Maher</i> and <i>Poelker</i> Decisions in Enacting and Retaining Abortion Funding Restrictions.	10
C. Lower Federal Courts Have Heavily Relied Upon the Clear Rationale of <i>Maher</i> and <i>Poelker</i> in Upholding the Constitutionality of Various Abortion Funding Restrictions.	11
III. <i>The Decision of the Court Below Cannot Be Reconciled With the Doctrine of Abortion Privacy Articulated in Roe v. Wade or Maher.</i>	13
A. There is No Constitutional Right To Funding "Medically Necessary" Abortions.	13
B. The Ruling of the District Court Directly Undermines the Constitutional Doctrine of Abortion Privacy.	14
IV. <i>Neither The Illinois Abortion Funding Restriction Nor The Hyde Amendment Violate the Equal Protection Doctrine.</i>	17
V. <i>The Public Welfare Will Be Profoundly Disserved If State Participating in the Medicaid Program Are to Subsidize "Medically Necessary" Abortions.</i>	20
CONCLUSION	23
CERTIFICATE OF SERVICE	25

TABLE OF CITATIONS

CASES	PAGE
Beal v. Doe, 432 U.S. 438 (1977)	8, 20, 21
Collautti v. Franklin, 439 U.S. 379 (1979)	18
D__R__v. Mitchell, 456 F. Supp. 609 (D. Utah 1978)	1, 7, 8, 12, 13, 20
Dandridge v. Williams, 397 U.S. 471 (1970)	7
Doe v. Bolton, 410 U.S. 179 (1973)	8, 15
Doe v. Klein, No. 1-76-134 (D.Ida. 1977) as discussed in <i>Abortion Law Reporter Medicaid 24.1 (12/77)</i>	12
Doe v. Klein, No. 76-74, (C.D. N.J. June 27, 1977) as discussed in <i>Abortion Law Reporter, Medicaid §23.1 (12/78)</i>	12
Doe v. Mundy, 441 F. Supp. 447, (E.D. Wisc. 1977) ..	12, 13
Doe v. Percy, 476 F. Supp. 324 (W.D. Wisc. 1979)	11
Doe v. Poelker, 515 F. 2d 541 (8th Cir. 1975)	19
Doe v. Poelker, 558 F2d 1346 (8th Cir. 1977)	12
Doe v. Stewart, 433 U.S. 901 (1977)	12
Doe v. Westby, Civ. 79-5017 (D.S.D. Feb 27, 1978)	12
Frieman v. Walsh, No. 77-4171-CV-C, slip op. (W.D. Mo. Jan. 26, 1979)	7, 12, 13
Lehocky v. Curators of the University of Missouri, 558 F2d 887 (8th Cir. 1977)	12
McRae v. Califano, No. 76-C-1804 (JFD), Transcript, Aug. 3, 1977 (B.D.N.V.)	15
Maher v. Roe, 432 U.S. 464 (1977)	<i>passim</i>
Poelker v. Doe, 432 U.S. 519 (1977)	<i>passim</i>

	PAGE
Roe v. Wade, 410 U.S. 113 (1973)	4, 8, 13-18
Woe v. Califano, 460 F. Supp 234 (S.D. Ohio 1978)	12, 13
Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979)	2, 3, 17, 18, 19, 21
Zbaraz v. Quern, 596 F. 2d 196 (7th Cir. 1979)	3

STATUTES:

P.A. 80-1091, Ill. Ann. Stat. Ch. 23, Sections 5-5, 6-1 and 7-1 (Smith-Hurd Supp. 1979)	2
Pub. L. 94-439, Title II §209, 90 Stat. 1434 (Sept. 30, 1976)	3
Pub. L. 95-205, §101, 91 Stat. 1460 (Dec. 9, 1977)	3
Pub. L. 95-480, §210, 92 Stat. 1586 (Oct. 18, 1978)	3
Title XIX, 42 U.S.C. §1396 <i>et seq</i> (1976)	1, 22
Utah Code Ann. §55-15a-3 (Supp. 1979)	1

MISCELLANEOUS:

Antioch Law School/National Abortion Rights Action League, Abortion Law Reporter	10, 11, 12
"Public Funding of Abortions Dominant Topic of State Laws Enacted in 1978" 8 Family Planning/Population Reporter (April, 1977)	10
8 Family Planning/Population Reporter (April 1979) ..	10
8 Family Planning/Population Reporter (October 1979)	10
L. Tribe, American Constitutional Law §15-10 (1978).	14
N. Y. Times, Mar. 8, 1979, at A-16, col. 1.	3, 8
Salt Lake Tribune, Nov. 17, 1979, A-7 at col. 1.	3

INTEREST OF THE AMICUS

The State of Utah has a statutory restriction which permits the use of public assistance funds for the performance of abortions only if the life of the mother is endangered. Utah Code Ann. §55-15a-3 (Supp. 1979). The constitutional and statutory propriety of this provision has been upheld by a federal district court, but an appeal from that ruling is presently pending before the Tenth Circuit Court of Appeals. *D.— R.— v. Mitchell*, 456 F. Supp. 609 (D. Utah 1978), *appeal pending*, Case No. 78-1675 (10th Cir.). Utah also is a participating state under the federal Medicaid program to which the Hyde Amendment applies. 42 U.S.C. §1396 *et seq* (1976). Thus, Utah has a direct and immediate interest in the determination of the issues in the case at bar.

SUMMARY OF ARGUMENT

The ruling of the court below defies the holding and rationale of *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977). In those cases this Court set the maximum and minimum limits to the range of constitutionally permissible abortion funding restrictions. The abortion funding provisions challenged in this case clearly fall within the parameters set in those cases.

Substantial deference must be given to the determination made by responsible state officials of the scope of "medically necessary" abortions that will be subsidized under state medical assistance programs. Responsible state officials have relied heavily upon the 1977 Supreme Court funding cases in enacting and retaining substantial abortion restrictions. The overwhelming majority of lower federal courts have relied heavily upon those cases in sustaining the constitutionality of abortion funding restrictions similar to those involved in the case at bar.

The ruling of the court below is fundamentally inconsistent with the basic jural postulate that underlies the constitutional doctrine of abortion privacy. The court below misapplied the

rational relation standard of equal protection analysis. If the ruling of the court below that additional medical services must be subsidized by states participating in a Medicaid program, is upheld it will have substantial ramifications that extend far beyond the abortion controversy, and will jeopardize the fiscal integrity of the entire medical assistance program.

ARGUMENT

I. *Under the Clear Rationale of Maher and Poelker, Neither the Illinois Abortion Funding Restriction Nor The Federal Hyde Amendment is Unconstitutional.*

A. *Maher and Poelker set the Maximum and Minimum Limits to the Range of Constitutionally Permissible Abortion Funding Restrictions.*

The primary defect of the ruling of the court below, *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill. 1979), is that it defies the holdings and rationale of *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977). The case at bar raises essentially the same constitutional issues that were decided in *Maher* and *Poelker*, and the constitutional analysis in the instant case must conform to the holdings and the rationale of those cases.

The principal issue in the instant case is whether or not the Illinois (lifesaving only) abortion funding restriction¹ and the abortion funding restriction (lifesaving, rape or incest, or

¹Essentially, the Illinois abortion funding restriction provides public medical assistance for only those abortions "necessary for the preservation of the life of the [pregnant] woman..." P.A. 80-1091, Ill. Ann. Stat. Ch. 23, Sections 5-5, 6-1 and 7-1 (Smith-Hurd Supp. 1979). These restrictions hereinafter are referred to collectively as "the Illinois abortion funding restriction".

It is noteworthy that approximately one-third of the states have adopted life-threatening abortion funding restrictions similar to the Illinois abortion funding restriction. See *infra*, note 6. Furthermore, the latest Hyde Amendment adopted by Congress contains (and the original Hyde Amendment contained) virtually the same abortion funding restrictions. See *infra*, note 2.

(Footnote continued.)

severe physical health damage) contained in the Hyde Amendment for Fiscal Year 1979² violate the equal protection doctrine when public assistance for comparable surgical procedures (e.g., childbirth services) is not similarly restricted. In *Maher* the issue decided by the Court was "whether the Constitution requires a participating State to pay for non-therapeutic abortions when it pays for childbirth." 432 U.S. at

(Footnote continued.)

Prior to the decision of the district court below the Court of Appeals had ruled that the Illinois Abortion funding restriction had to be applied so as to provide reimbursement for all abortions meeting the more liberal standards of the Fiscal Year 1979 Hyde Amendment. *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979). Thus, the ruling of the district court, on remand, on the constitutional issues effectively invalidated the judicially modified Illinois statute, i.e., interpreted to be the equivalent of the Fiscal Year 1979 Hyde Amendment (and the court intended its analysis to apply equally to the Hyde Amendment. 469 F. Supp. at 1215 n.3). However, herein "the Illinois abortion funding restriction" refers to the pre-judicially-revised "life-only" statutory scheme, while the "Hyde Amendment" refers to the more liberal provisions.

²The instant case deals with the Hyde Amendment to the appropriation act for Fiscal Year 1979, Pub. L. 95-480 §210, 92 Stat. 1586 (Oct. 18, 1978), which prohibited the expenditure of federal funds to pay for abortions except where (1) the life of the mother would be endangered if the fetus were carried to term, (2) the pregnancy resulted from rape or incest, promptly reported, or (3) where "severe and long-lasting physical health damage to a woman would result if the pregnancy were carried to term when so determined by two physicians." See also the Hyde Amendment for FY 1978, Pub. L. 95-205 §101, 91 Stat. 1460 (Dec. 9, 1977). The original Hyde Amendment to the Departments of Labor and Health, Education and Welfare Appropriation Act for Fiscal Year 1977, Pub. L. 94-439, Title II, Section 209, 90 Stat. 1434 (Sept. 30, 1976) permitted the expenditure of the funds for abortions only when the life of the mother would be endangered if the fetus were carried to term. Unless otherwise indicated, all references to "the Hyde Amendment" in the text refer exclusively to the Hyde Amendment for Fiscal Year 1979, i.e., the three-part Hyde Amendment dealt with by the district court.

The most recently enacted Hyde Amendment, for Fiscal Year 1980, permits federal funding of abortions only when necessary to save the life of the mother, or in the case of rape or incest. Salt Lake Tribune, Nov. 17, 1979, at A-7, col. 1. Since the effect of the rape or incest exception is insignificant (Secretary Califano testified that of the 2,421 Medicaid Abortions performed from February 14 through December 31, 1978, [he testified that prior to the Hyde Amendment between 250,000 and 300,000 abortions per year were subsidized under Medicaid] only 61 involved rape or incest victims, N.Y. Times, Mar. 8, 1979, at A-16, col. 1) the amendment now is effectively a "lifesaving-only" abortion funding restriction.

466. The Connecticut regulation examined in *Maier* limited medical assistance for abortions during the first trimester to those medically or psychiatrically necessary. *Id.* at 466 n.2. In *Poelker*, the issue was described by the Court as being "identical in principle" with that presented in *Maier*, even though the St. Louis city policy involved in that case prohibited the performance of abortions in city hospitals "except when there was a threat of grave physiological injury or death to the mother," and the doctors and medical students staffing the Ob/Gyn clinics in the city hospitals (i.e., the persons who would be making the medical necessity determinations in most cases) were drawn exclusively from a Jesuit-operated medical school opposed to abortion. 432 U.S. at 520. Thus, the constitutional issue in the instant case parallels the issues resolved by the Court in the *Maier* and *Poelker* opinions, and the arguments adopted by the court below are no different from those considered and rejected by the Supreme Court in those cases.

In *Maier* the Court reversed the declaratory judgment of a three-judge district court that the Connecticut abortion funding restriction was unconstitutional. The Court began its analysis with the unequivocal declaration that: "The Constitution imposes no obligation on the State's to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." 432 U.S. at 469. The "fundamental" right of abortion privacy articulated in *Roe v. Wade*, 410 U.S. 113 (1973), is not infringed by a state's refusal to subsidize abortion expenses, even if it pays for the medical expenses associated with childbirth.

Roe did not declare an unqualified 'constitutional right to an abortion' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to

implement that judgment by the allocation of public funds.

432 U.S. at 473, 474.

Because no fundamental right was infringed and no suspect classification involved, the abortion funding restriction would be upheld if it rationally furthered a constitutionally permissible state interest. *Id.* at 470, 478. The state interest in protecting the life of the fetus was recognized to be a profound and legitimate one.

Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus. That interest exists throughout the pregnancy 'grow[ing] in substantiality as the woman approaches them.' ... The state unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' ... an interest honored over the centuries.

432 U.S. at 478. And there was no question that the Connecticut abortion funding scheme, by subsidizing the high costs of childbirth, but not the significantly lower expenses of abortion, "was a rational means of encouraging childbirth." 432 U.S. at 479.

In *Poelker*, the Supreme Court, *per curiam*, applied the *Maier* analysis to the even more restrictive policy (and setting) in St. Louis. The Court itself defined the breadth of its holding in *Maier* and *Poelker* as follows: "We agree that the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in *Maier v. Roe*..." 432 U.S. 521 (emphasis added). Reversing the judgment of the Court of Appeals, the Supreme Court held that a life-saving-or-grave-physical-injury standard of "medical necessity", even when enforced at a public hospital by doctors presumably opposed to abortions, was constitutionally sustainable.

Thus, in *Maier* and *Poelker*, the Supreme Court defined the constitutionally permissible range of state restrictions on

abortion funding. In *Maher*, the Court clearly indicated that the maximum limit is *no limit*, i.e., a state constitutionally may subsidize *all* abortions, whether any medical justification for them exists or not. 432 U.S. at 480. And the language used by the court in *Poelker* suggests that the minimum limit, likewise, is *no limit*, i.e., a state may constitutionally choose to fund no abortions, even medically necessary abortions. 432 U.S. at 521. More importantly, however, the exact holding of *Poelker* clearly established that even if there is a minimum level of abortion funding which a state constitutionally must provide, it is lower or narrower than the scope of the St. Louis policy which was restricted to cases involving the threat of death or grave physiological injury to the mother.

B. Abortion Funding Restrictions, Like the Hyde Amendment, Which Are Limited to Abortions Necessary to Save the Life of the Mother, or in the Case of Pregnancy Caused by Felonious Intercourse, or Where Severe and Long-Lasting Physical Health Damage Would Result if the Fetus were Carried to Term, Fall Squarely Within the Parameters of Constitutionally Permissible Abortion Funding Restrictions.

The Hyde Amendment and other abortion funding restrictions similar to it are less restrictive (authorize funding of abortions to a greater extent) than the St. Louis policy upheld in *Poelker*. In addition to authorizing abortions under circumstances virtually identical to the circumstances permitted under *Poelker*, the Hyde Amendment additionally permits funding of abortions necessary to terminate pregnancies resulting from felonious intercourse (whether there is any medical justification for them or not). Accordingly, as a majority of the lower courts to consider this issue since *Poelker* have held, a Hyde Amendment-type of abortion funding restriction is constitutionally permissible under the holding and rationale of *Poelker* and *Maher*. See,

e.g., *Frieman v. Walsh*, No. 77-4171-CV-C, slip op. at 13-16 (W.D. Mo. Jan. 26, 1979). See cases *infra*, Part II C.

C. Abortion Funding Restrictions, Like the Illinois Abortion Funding Restriction, which Subsidize Abortions Only When the Life of the Mother is Endangered, Are Within the Range of Constitutionally Permissible Abortion Funding Restrictions Under the Rationale of *Maher* and *Poelker*.

The *Maher* and *Poelker* opinions indicate that a state constitutionally may refuse to subsidize any abortions. The declaration in *Maher* that "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related expenses of indigent women, or indeed to pay any of the[ir] medical expenses," 432 U.S. at 469, suggests that the Constitution shelters no substantive right or entitlement to public assistance for an abortion, even if the abortion is desperately needed to save the life of the mother. See *Poelker*, 432 U.S. at 521; *Maher*, 432 U.S. at 480 n.13; see also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

It would not infringe the constitutional doctrine of privacy if the state altogether refused to fund any abortions. The right of a woman to have an elective abortion for purely personal, non-medical reasons at any time prior to viability is just as fundamental as the right of a woman to have an abortion to preserve her life. See *Roe v. Wade*, 410 U.S. 113 (1973). Thus, refusal to finance the latter does not violate the constitutional right of abortion privacy any more than a refusal to subsidize the former. And since an absolute refusal to fund any abortions would not violate a "fundamental" right or involve a suspect classification, a "lifesaving-only" abortion funding prohibition would be upheld under equal protection analysis because, even if *unnecessarily* strict, it plainly would be "rationally related" to the legitimate state interests identified in *Maher*. See 432 U.S. at 478, 479. See *D.—R.— v. Mitchell*, 456 F. Supp. 609, 615 (D. Utah 1978).

Moreover, there is no significant difference between the Illinois abortion funding restriction ("lifesaving-only") and the St. Louis public hospital abortion policy upheld in *Poelker*. That policy permitted abortions when there was a "threat of grave physiological injury or death to the mother." Even if the phrase "grave physiological injury" was intended to establish a larger category of abortions than "lifesaving" abortions, the practical effect of such additional coverage is minimal. Few abortions would be permitted on the basis of "grave physiological injury" that could not be permitted under the "life-only" standard.³ For practical purposes, the Illinois funding restriction is not more restrictive than the St. Louis City hospital policy upheld in *Poelker*.⁴

II. Responsible State Officials And The Lower Federal Courts Have Relied Heavily Upon *Maier* and *Poelker* In Adopting And Upholding Abortion Funding Restrictions Similar to Those Invalidated By the Court Below.

A. A Legislative Determination of the Parameters of What Constitutes "Medically Necessary" Abortions

³A "lifesaving-only" standard of medical necessity does not straight-jacket medical judgment. It only defines, narrowly, the range of medical circumstances for which public funding of abortion will be permitted. Application of that standard in each individual case (i.e., determination of whether the situation at hand falls within the range so defined) still depends upon the independent, professional judgment of the physician, and there is room for sound medical discretion. In making that medical judgment, the physician may consider all appropriate medical criteria. See the district court's Final Judgment and Order of April 30, 1979, Exhibits A and B. See generally *D. — R. — v. Mitchell*, 456 F. Supp. at 611-614; *Woe v. Califano*, 460 F. Supp. at 235. Compare *Beal v. Doe*, 432 U.S. at 441, 442 n.3, 445 n.9. Of course, the "medical necessity" standard in a funding context need not allow consideration of the non-medical factors which a "medical necessity" exception to a statute prohibiting first-trimester abortion would have to permit in order to satisfy the constitutional doctrine of abortion privacy. *Doe v. Bolton*, 410 U.S. 179, 192; *Roe v. Wade*, 410 U.S. at 153.

⁴Of the 2,421 Medicaid abortions performed from February 14 through December 31, 1978, only 385 were certified under the "severe and longlasting physical health damage" standard. N.Y. Times, Mar. 8, 1979, at A-16, col. 1. Undoubtedly many of these could have been certified under the lifesaving-only provision if it were the only category applicable.

In A Medical Assistance Program Is Constitutionally Preferable to Any Judicial Determination.

The problem with the ruling of the court below is not necessarily that the definition it promulgated of "medically necessary" abortions is a bad definition or an erroneous one. Rather, the problem is that the court nullified and enjoined enforcement of two other equally legitimate and constitutionally permissible definitions of "medically necessary" abortions enacted by the elected representatives of the people.

Clearly, the determination of how the category of "medically necessary" abortions is to be defined in a public assistance scheme calls for a legislative policy judgment. Undoubtedly there are numerous ways in which it can be defined or described, and on a scale of volition, there is no "natural" or "immutable" point that clearly defines the transition from merely "desirable" to "necessary". Even if the Constitution required the funding of "medically necessary" abortions, it could not be said that, as a matter of substantive right, a particular type of exact level of coverage is constitutionally mandated. Such detailed specificity, even under the judicially-regulated right of abortion privacy, is not a part of our Constitutional scheme.

In *Maier* the Court went to great length to emphasize the substantial discretion which state legislatures have in resolving the difficult controversy of abortion funding.

The decision whether to expend state funds for non-therapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided.... [W]hen an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." ...

432 U.S. at 479, 480. The court further declared that "the Constitution does not require a judicially imposed resolution of these difficult issues." *Id.* at 480.

B. The States Have Relied Heavily on the *Maher* and *Poelker* Decisions in Enacting and Retaining Abortion Funding Restrictions.

Relying upon the clear rationale of *Maher* and *Poelker*, most states have adopted or reaffirmed substantial restrictions on the funding of abortions. A report entitled *Public Funding of Abortions Dominant Topic of State Laws Enacted in 1978* in an Alan Guttmacher Institute publication, 8 *Family Planning/Population Reporter* 20 (April, 1977) stated that: "One quarter of all fertility-related legislation enacted by the states in 1978 concerned public funding of abortions.... All together 11 states voted in 1978 to restrict the use of their funds to pay for abortions [while two other states enacted legislation permitting funding of all or most abortions.]"⁵ Another study published by the National Abortion Rights Action League/Antioch Law School *Abortion Law Reporter* reveals that as of December 12, 1978, 10 states would subsidize abortion only if the life of the mother were endangered; in 23 states abortions are subsidized under limited circumstances similar to the Hyde Amendment; another 9 states would pay for medically necessary abortions so determined by the woman's physician; and 8 states and the District of Columbia pay for virtually all abortions.⁶ Thus, as of one year ago,

⁵It appears that during 1979 ten states adopted or modified abortion funding restrictions. See 8 *Family Planning/Population Reporter* 23 (April 1979) and 8 *Family Planning/Population Reporter* 73, 74 (October 1979).

⁶*Abortion Law Reporter*, Medicaid at 31.1-31.22. The figures given in the summary of this report, at 31.1 and 31.2, are somewhat misleading as to the actual abortion funding policies adopted by the states. The report notes, for instances, that as of December 12, 1978, nine states would pay for abortions when medically necessary as determined by the woman and her physician, but a review of the nine "medically necessary" standard states in the more extensive state-by-state analysis section of the report reveals that seven of these nine states are paying for such abortions under court orders which nullified state legislation or regulations essentially restricting the

(Footnote continued.)

approximately 66% of the states restricted funding of abortions on grounds as narrow, or narrower, than the Hyde Amendment, and approximately 80% of the states had adopted public policies (including those states where such policies were adopted but enforcement of them was restrained by court order) restricting abortions to essentially the same or narrower circumstances. And approximately 17 states, or approximately 34%, had enacted legislation or regulations essentially limiting abortions to those necessary when the life of the mother is endangered.⁷ Clearly, the states have relied heavily on a clear holding and unambiguous rationale of the landmark funding decisions of 1977 in adopting and retaining these abortion funding restrictions.

C. Lower Federal Courts Have Relied Heavily Upon the Clear Rationale of *Maher* and *Poelker* in Upholding the Constitutionality of Various Abortion Funding Restrictions.

State legislators and administrators have not been alone in reading *Maher* and *Poelker* as authorizing abortion funding restrictions similar to those adopted by Illinois and the Federal Congress. Since those Supreme Court decisions were announced, ten lower courts have considered the constitutionality of various abortion funding restrictions. Besides the court below, only one federal court has held that abortion funding restrictions similar to those involved in this case are constitutionally prohibited. See *Doe v. Percy*, 476 F. Supp. 324 (W. D. Wis. 1979). In the other eight cases the lower courts perceived no constitutional barrier to upholding

(Footnote continued.)

expenditure of public funds except when the life of the woman was endangered (or rape or incest involved). Except as otherwise indicated, these seven cases have not been taken account in arriving at the figures used in this paragraph of the text. However, the "miscellaneous" states of Iowa, Maryland and Arizona have been added to the essentially-Hyde Amendment category, while Oregon has been added to the category of states paying for all or most abortions. (These alterations are justified by the *Abortion Law Reporter's* own description of the laws of these four states.)

⁷See *supra*, note 6.

similar abortion funding restrictions. See *D.— R.— v. Mitchell*, 456 F. Supp. 609; *Woe v. Califano*, 460 F. Supp. 234; *Frieman v. Walsh*, No 77-417-Cv-C (W. D. Mo. Jan. 26, 1979); *Doe v. Mundy*, 441 F. Supp. 447 (E. D. Wis. 1977); *Doe v. Poelker*, 558 F. 2d 1346 (8th Cir. 1977); *Doe v. Westby*, Civ. 79-5017 (D.S.D. Feb. 27, 1978); *Doe v. Klein*, (no. 76-74 CD.N.J. June 27, 1977) (as discussed in *Abortion Law Reporter*, Medicaid 23.1 (12/78); and *Doe v. Klein*, No. 1-76-134 (D. Ida. 1977) (as discussed in *Abortion Law Reporter*, Medicaid 24.1 (12/78). See also *Lehocky v. Curators of the University of Missouri*, 558 F. 2d 887 (8th Cir. 1977). A number of these cases involved lifting injunctions or modifying orders restraining enforcement of abortion funding restrictions that had been entered before *Maher*. See, e.g., *Doe v. Mundy*, *supra*; *Doe v. Westby*, *supra*; and *Doe v. Poelker*, *supra*.

Four of these cases involved essentially "lifesaving only" abortion funding restrictions. *D.— R.— v. Mitchell*, *supra*; *Woe v. Califano*, *supra*; *Doe v. Mundy*, *supra*; *Doe v. Klein*, No. 1-76-134 (D. Ida 1977). Furthermore, following the decision in *Maher*, this Court summarily affirmed a pre-*Maher* decision of the district court in Louisiana, upholding a lifesaving-only funding restriction. *Doe v. Stewart*, 433 U.S. 901 (1977). (See discussion of this case in *Abortion Law Reporter*, Medicaid 18.1 (12/77).)

In *D.— R.— v. Mitchell*, the district court upheld the constitutionality of Utah's "life-saving-only" abortion funding restriction which was intended by the Utah legislature to parallel the scope of the Fiscal Year, 1977 Hyde Amendment which was then in effect. After an extensive analysis of the constitutional issue, the court concluded, *inter alia*:

There is no reason why the principle articulated in *Maher* should not control the disposition of the constitutional issues in this case. The key concept set forth in *Maher* is that there is a basic difference between state interference with protected activity and state encouragement of an alternative activity. Even though fewer abortions might

be funded under Utah's statute, such a result would be constitutionally insignificant. If the State of Utah, under *Maher*, may make a choice favoring childbirth over abortion and implement that decision through the allocation of public funds, it may do so on any reasonable conditions. Given the state's strong interest in protecting the potential life of the fetus, encouraging normal childbirth and appropriately using state funds... the life-endangering standard... is entirely reasonable.

456 F. Supp. at 615.

In *Doe v. Mundy*, the court upheld a lifesaving-only county hospital abortion policy explaining:

In plaintiff's opinion, the Supreme Court has defined a therapeutic abortion as one based on "medical necessity."... The plaintiff's claim that there can be no rational basis for the county's determination not to fund abortions when a woman's health or physical integrity is endangered....

....

The plaintiffs' assertion... does not account for the non-conforming definition of a nontherapeutic abortion in *Poelker*.... *Beal*, *Maher* and *Poelker* declared no constitutional violation in the failure to provide funding for medically necessary abortions.

441 F. Supp. at 451, 452. See also *Woe v. Califano*, 460 F. Supp. at 236. And in *Frieman v. Walsh*, the court concluded "that it is not violative of the Equal Protection Clause for a state to pay for an indigent's childbirth expenses while refusing to fund the expenses incurred by an indigent to obtain an abortion [except under the Hyde Amendment criteria]." *Seip op.* at 16.

III. The Decision of the Court Below Cannot Be Reconciled With the Doctrine of Abortion Privacy Articulated in *Roe v. Wade* or *Maher*.

A. There is No Constitutional Right To Funding of "Medically Necessary" Abortions.⁸

⁸Nor does the Hyde Amendment (or the Illinois abortion funding restriction) violate the constitutional prohibition against the establishment

(Footnote continued.)

The right of abortion privacy articulated in *Roe v. Wade* protects a woman's private decision (i.e., protects the woman in her private circumstances) whether or not to have an abortion from governmental compulsion or undue restriction. *Maher*, 432 U.S. at 473, 474. It does not, however, grant a pregnant woman a right to be free from any governmental influence or exempt from the effects of any governmental policy whatever. And while *Roe v. Wade* states that a "life or health" exception is constitutionally required to any state prohibition of or restriction on abortion, this does not suggest that a woman has an affirmative right to a medically necessary abortion any more than *Roe's* holding that a woman has a right to choose to have an *elective* abortion during the first trimester means that she has a right to state-subsidized elective abortions then.

B. The Ruling of the District Court Directly Undermines the Constitutional Doctrine of Abortion Privacy.

If the ruling of the district court is allowed to stand, it will directly undermine the delicate doctrine of abortion privacy which the Court took great pains to establish in *Roe v. Wade*. In *Roe v. Wade*, the Court held that there was no absolute right to an abortion. 410 U.S. at 153, 154. However, abortion prohibitions or unduly burdensome restrictions infringe upon a constitutionally protected right of privacy and can only be sustained if they are necessary to effectuate a compelling state interest. 410 U.S. at 153-155. The point at which state interests in prohibiting or restricting abortions become compelling varies with the stage of pregnancy. There is a constitutional presumption that all abortion prohibitions applicable before

(Footnote continued.)

of religion. See, e.g., *Woe v. Califano* 460 F. Supp. at 237. It is worth noting that a prominent early exponent of the constitutional entanglement theory which forms the basis of the First Amendment challenge to an abortion funding restriction has clearly and equivocally renounced that position. L. Tribe, *American Constitutional Law* 15-10 at 928 (1978).

the point of viability, except second-trimester medical restrictions, do *not* serve any compelling state interest; however, after the point of viability there is a constitutional presumption that abortion restrictions are necessary to effectuate compelling state interests in fetal life and maternal health. But even after viability the state may not prohibit abortions which are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 163.

The scope of this non-restrictable category of "medically necessary" abortion, applicable as it is even after the point of viability when the state has a compelling interest is very narrow. It must not be confused with the abortion-on-demand scope of "medically necessary" abortions that *must* be permitted under a statute that *forbids* any abortions during the first trimester. *Doe v. Bolton*, 410 U.S. at 192; see also *Roe*, 410 U.S. at 153. But, if the liberal parameters for determining "medically necessary" abortions established by the court below are transferred to the *Roe v. Wade* model of abortion regulation, that will destroy the constitutional doctrine of abortion privacy.⁹ In essence, it will permit abortion on demand throughout pregnancy.

Of course, it may be suggested that the generous "medically necessary" abortion definition adopted by the district court was meant solely for use in the funding context and cannot be transferred to the mainline *Roe v. Wade* abortion doctrine. But

⁹The dangers inherent in the unqualified language of "medical necessity" are reflected in the testimony of Jane Hodgson, M.D., during litigation on the Hyde Amendment. Dr. Hodgson, one of the plaintiffs seeking the invalidation of the Hyde Amendment testified as follows:

In my medical judgement every [pregnancy] that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.

In good faith, I would recommend on a medical basis, you understand that, and it would be 100%. . . . I think they are all medically necessary. . . .

Transcript, Aug. 3, 1977, at 99-101, *McRae v. Califano*, No. 76-C-1804 (JFD) (E.D.N.Y.).

that would lead to an even more anomalous result: states would have the constitutional duty to subsidize abortions (because they were "medically necessary," under the district court definition) which under the *Roe v. Wade* doctrine they constitutionally may altogether prohibit (because they are not "medically necessary" abortions).

Moreover, the position of the court below is fundamentally at odds with the basic jural postulate that underlies the constitutional abortion doctrine, i.e., the doctrine of privacy. Privacy, as a constitutional doctrine, is result-neutral, i.e., it is neither pro- nor anti-abortion. It is essentially a protective concept, shielding the individual from the abusive or intrusive exercise of governmental powers.¹⁰

The position taken by the District Court cannot be justified by reference to the doctrine of privacy as we now know it. The Court obviously had this in mind when it stated, in *Maher*:

[T]he right [of privacy] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy....

The Connecticut regulation before us is different in kind from the laws invalidated in previous abortion decisions. The Connecticut regulation places no obstacle—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantages as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependant on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that made it difficult—and in some cases impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut

¹⁰The constitutional right of privacy is not an affirmative doctrine, it is not a doctrine of self fulfillment. Those who attempt to portray it as such mistake a beneficial function of the privacy doctrine for the constitutional doctrine itself.

regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

432 U.S. at 473, 474.

That is not to say that there are not other possible jural postulates which might justify the position reached by the District Court. If the Constitution embodied fundamental values favoring zero population growth, total lifestyle freedom, or absolute economic equality, and if abortion were deemed to be necessary to achieve those ends, the decision of the lower court would be sustainable. To date, however, this Court has not adopted any such constitutional values, nor endorsed any such *pro*-abortion jural postulates.

IV. *Neither The Illinois Abortion Funding Restriction Nor the Hyde Amendment Violates the Equal Protection Doctrine.*

The court below correctly observed that inasmuch as the abortion funding restrictions do not impinge upon any fundamental constitutional right or suspect classification, the appropriate standard of judicial scrutiny is the "rational relation" standard of analysis. 469 F. Supp. at 1216-1218. Unfortunately, however, the court failed to properly apply the standard of analysis it had identified.

The district court reasoned, in part:

Under *Maher*, a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary. This approach, which recognizes that the fetus is being carried within a living, human being, is consistent with Supreme Court decisions which suggest that the interest in the fetus cannot be isolated from the interest in the health of the mother....

As a consequence of the state's viewing the fetus apart from the mother, the mother may be subjected to

considerable risk of severe medical problems, which may even result in her death....

469 F. Supp. at 1219. Since the Illinois Abortion funding restriction and the Hyde Amendment would delay needed medical treatment for indigent mothers until the risk to the mother's life was substantial, it imposed a constitutionally unreasonable cost on indigent women. Therefore, the court reasoned, the state's interest in protecting the potential life of the fetus was not only not compelling, but it was not even "legitimate." "For the reasons just discussed, a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate." *Id.* at 1221.

The district court seems to have fallen into error, at least in part, because of its inability to hold fast to the concept that restrictive funding provisions are not direct prohibitions of abortions, and that there is a constitutionally significant distinction between refusing to pay for certain abortions and directly prohibiting the performance of the same. Thus, in support of its argument that "the interest [of the state] in the fetus cannot be isolated from the interest of the mother," the court below relied upon the Supreme Court decisions in *Roe v. Wade* and *Colautti v. Franklin*, 439 U.S. 379 (1979), both cases involving statutes directly prohibiting certain abortion practices. Likewise, when the court observed: "We cannot hold that the state has a legal interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent women" it appears to have forgotten that neither the Illinois abortion funding restriction nor the Hyde Amendment imposes "increased maternal morbidity and mortality among indigent woman"—they simply fail to extend public assistance to relieve indigent women of problems caused, *inter alia*, by the private fee structure of the medical and fertility service industries.

The conclusion of the Court below that a state does not have "a legitimate interest in protecting the life of a non-viable fetus in a woman for whom an abortion is medically necessary [in any doctor's opinion]" flies directly in the face of the holding of this Court in *Poelker*.¹¹ The suggestion that a state may not "separate" the interest of the fetus from that of the mother prior to the point of viability defies the holding of this court in *Maher*:

Roe itself explicitly acknowledged the state's strong interest in protecting the potential life of the fetus. That interest exists throughout pregnancy, 'grow[ing] in substantiality as the woman approaches term.'... The state unquestionably has a 'strong and legitimate interest

¹¹The court below, in a footnote, 469 F. Supp. at 1219 n.9., attempted to distinguish *Poelker* but the attempt is unsuccessful because it is based on two significant factual misconceptions. The district court argued that since the particular representative plaintiff in *Poelker* did not have "any medical reason to justify an abortion," the Supreme Court really only upheld the St. Louis policy as applied to her only, and did not imply that women who had medical reasons for abortions could be excluded under that policy. This argument, however, overlooks the fact that *Doe v. Poelker* was a class action, and the class apparently included women who had medical problems for which an abortion might be "indicated," though not "necessary" under the strict St. Louis guidelines. See generally *Doe v. Poelker*, 515 F.2d 541, 546 (8th Cir. 1975). Moreover, the suggestion of the court below that "physicians could not find any 'medical reason to justify an abortion'" for the named-plaintiff is misleading. The Court of Appeals in that case found, based on medical evidence presented in the record, that "Doe was suffering from cervical fibroid tumors and polyps, an extremely retroverted uterus and trichomycosis." 515 F.2d at 543. The real problem was that under that stringent standard of "medical necessity" promulgated by the city of St. Louis, none of the doctors from the Jesuit-run medical school would certify that abortion for the plaintiff, even in those circumstances, was "medically necessary".

In fact, the underlying question in *Doe v. Poelker* was the same as the core question in the instant case: whether the elected representative of the people can define "medically necessary" abortions so narrowly that public funds will subsidize abortions in extremely serious cases only, or must the parameters of the class of "medically necessary" abortions that will be publicly subsidized, as well as the medical judgment whether a particular case falls within those parameters, constitutionally be left to the sole discretion of the pregnant woman's physician. The holding of the court below squarely contradicts the holding of the Supreme Court in *Poelker* on this point.

in encouraging normal childbirth' ... an interest honored over the centuries.

432 U.S. at 478 (emphasis added). Furthermore, in the companion case of *Beal v. Doe* 432 U.S. 438 (1977) the Court held:

[T]he state has a valid and important interest in encouraging childbirth. ... That interest alone does not, at least until approximately the third trimester become sufficiently compelling to justify an unduly burdensome state interference with the woman's constitutionally protected privacy interest. *But it is a significant state interest existing throughout the course of the woman's pregnancy.*"

432 U.S. at 445, 446 (emphasis added). In fact, in *Maher* the Court noted several *other* legitimate policy interests which could be furthered by a policy of public funding inducements favoring childbirth over abortion. 432 U.S. at 478 n.11. Thus, to accept the ruling of the Court below that these state interests are not even "legitimate" would require a direct repudiation of the holding and rationale of cases decided by this Court less than 3 years ago.¹²

V. The Public Welfare Will Be Profoundly Disserved If States Participating in the Medicaid Program Are Required to Subsidize "Medically Necessary" Abortions.

If this Court upholds the ruling of the court below that Illinois must provide more extensive funding of certain medical services because, in the opinion of a federal judge (and contrary to the conclusion of the responsible state officials) they are "medically necessary," it will have ramifications that extend far beyond the abortion context. How many other

¹²There is no question that a funding restriction rationally relates to these interests. *Maher*, 432 U.S. at 479. While it may be true that abortion funding is more restrictive than the funding of other surgical procedures, "[t]he simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life" *Maher*, 432 U.S. at 480. See also Judge Anderson's excellent analysis of this point in *D. — R. — v. Mitchell*, 456 F. Supp. at 611-615.

medical services are participating states now not funding that might, in the opinion of the next judge, be considered "medically necessary"? If the ruling of the court below is upheld, it will serve as an open invitation to a deluge of litigation, and invite judicial expansion of mandatory Medicaid funding for a vast panoply of other services to an extent that could demolish the medical assistance program.

The ruling of the court below disregards the crucial distinction between "medically necessary" and "medically desirable" abortions. The district court erroneously concluded that the Illinois abortion funding restriction and the Hyde Amendment violate equal protection doctrine because, without furthering a legitimate state interest, "indigent women in medical need of abortions are treated differently than indigent women in medical need of other surgical procedures. ..." 469 F. Supp. at 1218. The lower court's analysis, however, is built upon the bald assumption, nowhere defended or discussed in the opinion, that these abortion funding restrictions do not adequately subsidize "medically necessary" abortions.¹³

This predicate of the district court ignores the clear indication in the 1977 funding cases of this Court that there is a fundamental distinction between "medically necessary" and "medically desirable" abortions. In *Maher*, *Poelker* and *Beal*, the court used these terms, and their respective synonyms, ("therapeutic" and "non-therapeutic" or "elective"), for contrast, to describe the opposite ends of the spectrum of possible abortion funding schemes. See *Beal*, 432 U.S. at 444, 445; *Maher*, 432 U.S. at 466, 480; and *Poelker*, 432 U.S. at 520, 521. "Necessary" connotes compulsion, obligation, unavoidable, or lack of alternatives. "Desirable" connotes preferable, attractive, pleasing, or wishful. These concepts are

¹³See generally 469 F. Supp. at 1219: "The Connecticut statute differed from the Illinois statute challenged here because it provided for the funding of 'medically necessary' abortions. We believe this distinction to be crucial to the determination of the case." (emphasis added.)

not mutually exclusive, as a "need" may be "desired," and a "medically necessary" procedure usually will be "medically desirable" also. But when used to suggest a contrast, as in the Supreme Court decisions, these phrases mark the opposite poles of the spectrum of personal (and, in this instance, medical) volition. The court below simply erred in assuming that the class of "medically necessary" abortions constitutionally must include a greater range of "medically desirable" abortions than the Illinois and federal legislatures would subsidize.

Finally, this Court should be most reluctant to read into Title XIX of the Social Security Act (either by statutory or constitutional construction) a requirement not expressed there that states are required to fund all "medically desirable" services or even all "medically necessary" services. The futility of imposing such a requirement judicially, especially when there is neither legislative nor medical consensus as to the limits of necessity, is well illustrated in the history of the abortion funding litigation. Similar potential litigation lurks within Title XIX concerning a vast array of other medical services.

CONCLUSION

For the reasons set forth above, this Court should reverse the ruling of the district court and explicitly hold that the Illinois abortion funding restriction, as enacted, and the Hyde Amendment do not contravene the right of abortion privacy or the equal protection guarantees of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

State of Utah)
) ss
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I, Lynn D. Wardle, one of the attorneys for Amicus Curiae, being a member of the Bar of the Supreme Court of the United States, do hereby certify that all parties required to be served have been served and that I caused true and correct copies of the foregoing brief to be served upon counsel of record for the Appellants and Appellees in these consolidated cases in accordance with Rule 33 of the Rules of Supreme Court of the United States by depositing such briefs this day in a United States Postal Service mailbox, with first-class (airmail) postage prepaid, addressed to the following:

Dennis J. Horan, John D. Gorby, Victor G. Rosenblum, Patrick A. Trueman and Thomas A. Marzen, Americans United for Life Legal Defense Fund, 230 North Michigan, Suite 515, Chicago, IL 60601; William J. Scott, Attorney General of the State of Illinois and William A. Wenzel, III, 160 North La Salle Street, Chicago, IL 60601; Aviva Futorian, Robert E. Lehrer, Wendy Meltzer, and James D. Weill, Legal Assistance Foundation of Chicago, 343 South Dearborn Street, Chicago, IL 60604; Robert W. Bennett 357 East Chicago Avenue, Chicago, IL 60611; Lois J. Lipton and David Goldberger, Roger Baldwin Foundation of ACLU, Inc., 5 South Wabash Ave., Chicago, IL 60603, and Wade H. McCree, Jr. Solicitor General, Department of Justice, Washington, D.C. 20530.

All done this 9th day of January, 1980.

Lynn D. Wardle

Supreme Court, U.S.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1979

Nos. 79-4, 79-5 and 79-491

JASPER F. WILLIAMS and EUGENE F. DIAMOND,
Appellants,

v.

DAVID ZBARAZ, et al.,
Appellees.

JEFFREY C. MILLER, Acting Director,
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Appellants,

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**APPEAL TO THE SUPREME COURT OF THE UNITED STATES
FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

**BRIEF OF THE STATES OF WISCONSIN AND OHIO AS
AMICI CURIAE IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

	<i>Page</i>
INTEREST OF THE AMICI CURIAE	1
QUESTIONS PRESENTED	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Supreme Court, In <i>Poelker v. Doe</i>, Held That The Limitations On Public Funding Of Abortions More Restrictive Than Those Enacted Here Are Constitutional.	3
A. <i>The Class in Poelker included women seeking medically necessary abortions.</i>	6
B. <i>The named plaintiff in Poelker presented the claim made by the instant plaintiffs.</i>	9
C. <i>The holding of the supreme court in Poelker forecloses the instant case of action.</i>	12
II. Other Supreme Court Prescedent, Principally <i>Maher v. Roe</i>, And <i>Roe v. Wade</i>, Support The Limitations On Public Funding Of Abortions Enacted Here.	13
A. <i>The impact of the state's funding decision on plaintiffs' choice was improperly characterized and weighed by the district court.</i>	13

	<i>Page</i>
B. <i>The state's legitimate interests are improperly characterized and diminished by the district court.</i>	17
III. Supreme Court Precedent Supports The Funding Decisions Made By The Federal And Illinois Legislatures.	18
CONCLUSION	20

TABLE OF CASES

Beal v. Doe, 432 U.S. 438 (1977)	4
Doe v. Mundy, 441 F. Supp. 447 (E.D. Wis. 1977)	4
Doe v. Poelker, 432 U.S. 519 (1977), 515 F.2d 541 (8th Cir. 1975), 497 F.2d 1063 (8th Cir. 1974)	passim
Kantrowitz v. Weinberger, 388 F. Supp. 1127 (D. D.C. 1974)	20
Legion v. Richardson, 354 F. Supp. 456 (S.D. N.Y. 1973) aff'd sub nom. Legion v. Weinberger, 414 U.S. 1058 (1973) rehearing denied, 415 U.S. 939 (1974)	20
Maher v. Roe, 432 U.S. 464 (1977)	passim

	<i>Page</i>
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	15,16
Roe v. Wade, 410 U.S. 114 (1973)	passim
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	13
Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979)	9,17

FEDERAL STATUTES

42 U.S.C. §1396	1
42 U.S.C. §1396d (a) (15) (B) (1970)	20

WISCONSIN STATUTES

Section 20.927, Stats. (1977)	1
-------------------------------------	---

OTHER AUTHORITIES

Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, ch. III, §275	5
P.A. 80 1091. Rev. Stats. Supp. 1978, ch. 23, sec. 5-5	3
Section 210 of House Bill 204, 113th Ohio General Assembly	1

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BRIEF OF THE STATES OF WISCONSIN AND OHIO AS
AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The states filing this brief have a direct financial and public policy interest in the outcome of this case. At stake are state and federal efforts to determine how public funds are allocated. Also at stake are concerns as expressed by organized society on what are the appropriate limits of personal and societal interests in matters of the utmost sensitivity and gravity: governmental provision of public resources to effectuate a decision to abort a human fetus.

The elected representatives of both Ohio^{1/} and Wisconsin^{2/} have enacted into their state statutes limitations on the circumstances where public funding will be provided to cover the performance of an abortion in their state Medical Assistance Programs.^{3/} These state limitations are essentially similar to those Illinois statutory provisions struck down in the instant case. They are also essentially similar to the federal statutory provisions struck down in the instant case.

Wisconsin and Ohio as sovereign states have interests, more fully set forth in the Argument of this brief, which have equal vigor and dignity as those of Appellant representatives of the State of Illinois. Their citizens should be heard on the matters at issue.

^{1/}Section 210 of House Bill 204, 113th Ohio General Assembly.

^{2/}Section 20.927, Stats., (1977)

^{3/}These are plans of state participation in the federal program codified in 42 U.S.C. § 1396 *et seq* (Medicaid Program).

QUESTIONS PRESENTED

1. Did the Supreme Court in *Poelker v. Doe*, 432 U.S. 519 (1977), hold that limitations on public funding of abortions more restrictive than those enacted here are constitutional.

2. Does other Supreme Court precedent, principally *Maher v. Roe*, 432 U.S. 464 (1977), and *Roe v. Wade*, 410, U.S. 113 (1973), support the limitations on public funding of abortions enacted here.

SUMMARY OF ARGUMENT

The claims of the instant plaintiffs have been considered and rejected by this court in *Poelker v. Doe*, 432 U.S. 519 (1977). The named plaintiff in *Poelker* presented the same claim arising from her medical condition as the instant plaintiff class seeking governmental funding for certain "medically necessary" abortions. The plaintiff class in *Poelker* also included the instant plaintiff class claims. Their rejection in *Poelker* requires rejection here.

Further, *Maher v. Roe*, 432 U.S. 464 (1977) held that affirmative funding decisions such as those challenged here do not in any way infringe on a woman's right to choose an abortion. The circumstance of a woman having a certain health condition also not caused by the legislature's funding decisions does not create an effect where none existed before. *Id.* at 473-474. *Maher* also held that the state's interest in the potential life of the fetus was strong and legitimate. There being no burden imposed and a strong state interest, the funding choices are constitutional.

ARGUMENT

Amici submit that the district court erred in two basic respects. The first is that it ignored the holding of *Poelker v. Doe*, 432 U.S. 519 (1977). The second is that other precedent, principally *Maher v. Roe*, 432 U.S. 464 (1977) and *Roe v. Wade*, 410 U.S. 113 (1973), have been improperly interpreted by the court below.

I. The Supreme Court, In *Poelker v. Doe*, Held That The Limitations On Public Funding Of Abortions More Restrictive Than Those Enacted Here Are Constitutional.

Plaintiffs' principal argument appears to be that federal and state legislative determinations regarding the types of services to provide recipients of the Medicaid Program unduly burdens the rights of plaintiffs, indigent pregnant women seeking "medically necessary"^{4/} abortion and abortion performing physicians. This same claim, related to a more restrictive city regulation, was rejected by this court in *Poelker v. Doe*, *supra*. This clear legal precedent is controlling.

^{4/}The Illinois Medicaid Program covers some medically necessary abortion procedures. It covers those circumstances where the procedure is "necessary for the preservation of the life of the ... woman ..." P.A. 80 1091. Rev. Stat. Supp. 1978, ch. 23, sec. 5-5. It does not cover abortion procedures where the health of the mother is impaired to a lesser degree. Thus, it does not cover the entire range of circumstances that a physician may view as "medically necessary" as ordered by the court below. 469 F. Supp. at 1221. Hereinafter such mandated subset of medically necessary procedures will be referred to as "medically necessary."

The "regulation" challenged by an indigent pregnant woman in *Poelker* "prohibited the performance of abortions in the city hospitals except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520.

The federal and state laws challenged in the instant case are less restrictive. They prohibit no hospital or physician from performing therapeutic^{5/} abortions. They only restrict^{6/} state funding of abortions in its Medical Assistance Program to circumstances very similar to that in *Poelker*.

In *Poelker*, the plaintiff asserted that closing the doors of public hospitals for nontherapeutic abortions denied her "equal protection of the law" by allowing other medical procedures, including maternity care incident to term childbirth. 515 F.2d at 544. The court of appeals, in its opinion could find "[n]o rational or legally cognized basis for this distinction." *Id.* at 544.

^{5/}Therapeutic, as used by the parties and courts in *Poelker*, means abortions "to save the mother from grave physiological injury or death." 515 F.2d 541, 543.

The term is used in the principal cases (*Beal v. Doe*, 432 U.S. 438 (1977), *Maher* and *Poelker* with a meaning that is shaped by the underlying facts of each case. Thus, circumstances covered by the regulation at issue are denominated "therapeutic," those not covered "non-therapeutic." Because the challenged regulations vary from case to case, the content of the terms varies. They are "nonconforming." *Doe v. Mundy*, 441 F. Supp. 447, 451 (E.D. Wis. 1977).

^{6/}Although the federal law allows the states to fund more services than those covered by the Hyde Amendment, Illinois has chosen to fund only substantially the same services. Thus, as challenged here the

The United States Supreme Court followed the same method of legal analysis employed by circuit court, but reached a conclusion which forecloses the claim in the instant case. It upheld the city's policy by finding ample rational and legal support for its determination. The language used by the court is particularly instructive in the instant case:

We agree that the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. [*Maher v. Roe*, 432 U.S. 464 (1977)] ... [w]e find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

432 U.S. at 521.

In *Maher v. Roe*, after disposing of irrelevant claims the Supreme Court recognized two rational and legitimate state interests which validated the Connecticut Public Assistance regulation^{7/} which funded

effect of the federal law in conjunction with the actions of the Illinois Legislature will be referred to as the effect of both laws.

^{7/}Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, ch. III, § 275, provides in relevant part:

"The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following condition is met:

childbirth but not "nontherapeutic" abortions. 432 U.S. at 478. The first is the "States strong interest in protecting the potential life of the fetus." *Id.* The court noted that this interest exists "throughout the pregnancy." *Id.* The court unequivocally stated "[T]here can be [no] question that the Connecticut regulation rationally furthered that interest." *Id.*

The second legitimate interest, equally applicable in *Poelker* and the instant case, involves "demographic concerns about its rate of population growth. Such concerns are basic to the future of the State." *Id.*, fn. 11.

Amici concede that the regulation in *Maher* reflects a policy judgment to fund more types of abortion procedures than the federal and state laws at issue here provide. Were it the only directive given by the Supreme Court, the instant matter would be open to considerable legal argument. However, the resolution of the "constitutional question...identical in principle" in *Poelker* (432 U.S. at 521) by the Supreme Court, where the governmental prohibition was more absolute, forecloses further debate on whether the scope of *Maher* should be limited to its facts. It cannot be so limited. The Supreme Court found prohibitions by the city of St. Louis challenged in *Poelker* are explicitly within the legal principles applicable in *Maher*.

A. *The class in Poelker included women seeking medically necessary abortions.*

"1. In the opinion of the attending physician the abortion is medically necessary. The term 'Medically Necessary' includes psychiatric necessity.

Poelker v. Doe was treated^{8/} as a class action throughout the appellate process. References to the class plaintiffs include:

"We conclude here that Doe has standing ... and her class can be recognized." 497 F.2d 1063, 1067 (8th Cir. 1974).

"... this civil rights class action" 515 F.2d 541, 542 (8th Cir. 1975).

"The official city policy and the 'staffing procedure' were applied to Doe and the other members of her class" *Id.* at 544.

"We conclude that the city policy against all nontherapeutic abortions together with the staffing procedures at the OB-GYN clinic of the city hospital combined to deny Doe and her class" *Id.* at 545.

Finally, this court used unambiguous language in stating the representative role of plaintiff Doe. "She ... brought this class action ..." 432 U.S. 519 (1977).

It is crucial, therefore, to determine whether the class of plaintiffs in *Poelker* included women for whom an abortion was "medically necessary." If the *Poelker* plaintiffs included such a class, then this court's upholding the regulation at issue there, clearly at least

8. Both plaintiffs' and defendants' counsel in *Poelker* have advised this counsel that a formal class certification had never been ordered by the trial court. The clerk, Federal District Court, Eastern District of Missouri, confirmed that there was no such docket entry. The court, after remand from the Eighth Circuit with the directive "... Doe has standing ... and her class can be recognized" 497 F.2d 1063, 1067 (8th Cir. 1974), apparently did not formally enter such an order.

as restrictive as those at issue in the instant case, would represent clear precedent foreclosing the instant plaintiffs' claims.

The class is described in the complaint as "consisting of pregnant, women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis, Missouri, for the medical termination of said pregnancy." Complaint par. 12 (Appendix at 3.)

There is no limit placed on the reasons underlying or compelling the "desire" to use the services by the language of this description. There is no principle of law that limits the meaning, therefore, to persons seeking an abortion at a whim, pursuant to religious or philosophical beliefs, for optional medical treatment, for necessary medical treatment or any other reasons deemed insufficient by the standard imposed by the regulation challenged. All persons seeking an abortion for reasons other than for therapeutic purposes are included.

The class of excluded women thus found to have standing in *Poelker* and whose claims are represented by Doe include, therefore, women seeking "medically necessary" abortions within the meaning of the terms in this lawsuit. There can be no doubt the instant plaintiff and her class could not have qualified under the *Poelker* regulation. That women seeking "medically necessary" abortions are among the class in *Poelker* is clear when one considers whether they would be barred from any relief granted. It cannot be denied they would benefit from the decision as members of the class. They must also be bound by it.

Additional support for this conclusion is found in the circumstances and characteristics of the named plaintiff. Since she is representative of, as well as a

constituent part of, the class, her personal condition is critical to understanding the class. That she also comes within the instant case will be demonstrated in sec. I.B. *infra*.

In sum, the class in *Poelker* included women making the claim advanced by plaintiffs in the instant case. Their claims were rejected in *Poelker*. They are foreclosed.

B. The named plaintiff in Poelker presented the claim made by the instant plaintiffs.

The plaintiff in *Poelker*, had all the attributes of the class certified in the instant case save the official labelling of "medically necessary" in *haec verba*.

The class characteristics of indigency and eligibility for public medical assistance are patent.

The nature of the relevant physical medical need defining the class has been determined in the instant case to be "medically necessary but not necessary for the preservation of [life]" 469 F. Supp. at 1213 fn. 1.

In her verified complaint plaintiff Doe in *Poelker* stated "On [two] occasions she was advised by [Max C. Starkloff Hospital] staff physicians to seek an abortion ... and then to return to said hospital for a *hysterec-tomy* ... a procedure recommended by said hospital staff physicians based upon her medical and physical condition." Complaint par. 10. (Appendix at 3.) (emphasis supplied.) See also Affidavit of Plaintiff, Jane Doe par. 7. (Appendix at 8.)

It may be argued by the instant plaintiffs that there is technically no determination in the record^{9/}

^{9/}Plaintiffs may argue that this record is unclear or is contradicted by certain affidavits of certain

that the hysterectomy was "medically necessary" but only "recommended." Therefore it may be suggested, even though the abortion was the essential first step of a recommended procedure, the basis for the procedure is not adequately established.

The record in *Poelker*, however, establishes that the staff at Max C. Starkloff was bound by regulation only to recommend procedures which "accomplish sterilization" such as a hysterectomy for "medical indications." Max C. Starkloff Hospital, Part II — Rules and Regulations, E. *General Rules Regarding Abortions and Sterilizations*, quoted in part in defendants' Answer to Interrogatories in *Poelker*. (Appendix at 12.) The *same standard* of medical necessity and no more is required before a therapeutic abortion may be performed. *Id.* The exactitude of the latter standard has been frequently and pointedly noted. There can be no doubt that both of the procedures were "medically necessary."

As much is asserted in the *Poelker* complaint where the defendants' conduct is characterized as "subjecting her life ... to increased possibility of loss." Complaint, par. 15 f. (Appendix at 5.)

The plaintiff in *Poelker* was not seeking an abortion on a whim. She was told to get one by doctors

physicians. The circumstance that *other* students and doctors at another setting did not make the same diagnosis (See, e.g. 515 F.2d 541, 543) is irrelevant. There is no requirement for a majority diagnosis in *Poelker* or here. Only one physician need establish medical need. Second, it may not be necessary to resolve this matter. Should plaintiffs contend this matter was hotly disputed, this court has disposed of the necessity for resolving this problem. 432 U.S. at 520 at fn. 1.

held to a very high standard of medical need by regulation. She was a woman in medical need of an abortion and a hysterectomy.

These essential underlying facts were apparently well understood by the Eighth Circuit when it summarized them as follows:

Twice she consulted staff members at Starkloff Memorial Hospital ... and was advised that she would *require* a hysterectomy. They told her to procure an abortion elsewhere and then return to the hospital for the hysterectomy.

497 F.2d 1063, 1065 (emphasis supplied).

The district court in its opinion appears to consider these facts not relevant and relies on the use of the terms "therapeutic" and "nontherapeutic" to reach its conclusion as to the holding of *Poelker*.

Amici have three responses. First, no general conclusions can properly be drawn from the use of the terms therapeutic or nontherapeutic. See fn. 5, *supra*.

Second, amici suggest that detailed discussion of plaintiff's medical condition was not set forth in the *Poelker* decision because the Supreme Court considered it not relevant, *i.e.*, no matter what degree of medical need she had (less than the regulation) she was *not* entitled to relief. Amici submit that is the holding of *Poelker*.

Lastly, the underlying facts of the plaintiff's medical condition in *Poelker* were clearly part of the record considered by the Supreme Court. The concise summary of Doe's multiple health problems, which the record disclosed made an abortion medically necessary in the opinion of the staff physicians at Starkloff Hospital, was made by the Eighth Circuit in its second opinion: "Doe was suffering from cervical fibroid

tumors and polyps, an extremely retroverted uterus and trichomycosis." 515 F.2d at 543. This court stated that on the basis of the "facts as stated in [the Eighth Circuit's second] opinion," the plaintiffs' claims were found without constitutional support. 432 U.S. at 520.

They must be so found in the instant case.

C. The holding of the Supreme Court in Poelker forecloses the instant plaintiff's cause of action.

Briefly, this court was well aware of the nature and extent of the abortion procedures that the defendant in *Poelker* considered nontherapeutic¹⁰. The limitations were more restrictive than at issue here. These limitations were in the context of a program of general inpatient hospital care for indigents.

The Supreme Court held, nevertheless, that there was "no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." 432 U.S. at 521.

The Court was well advised of the impact the board definition of nontherapeutic had had in *Poelker*. From the time the regulation went into effect until at least the second decision of the court of appeals two and one-half years later, no abortions had been performed in the city hospitals. 515 F. 2d at 544, fn. 5. Nevertheless, the court concluded: "We ... hold that the Constitution does not forbid a State ... from expressing

¹⁰/The district court determined "nontherapeutic" procedures included all procedures except "to save the mother from grave physiological injury or death." 515 F.2d 541, 543. See also, fn. 4 *supra*.

a preference for normal childbirth as *St. Louis has done*." 432 U.S. at 521 (emphasis supplied) (footnote omitted).

In sum, both the rule and the effective foreclosing of "nontherapeutic" abortions was specifically upheld in a class action where both the plaintiff and members of the class were seeking "medically necessary" abortions in the context of a city-run inpatient hospital program. The instant plaintiffs' claim is therefore foreclosed.

II. Other Supreme Court Precedent, Principally *Maher v. Roe* And *Roe v. Wade*, Support The Limitations On Public Funding Of Abortions Enacted Here.

As properly acknowledged by the court below, the proper analytical process to be used in analyzing abortion funding legislation is explicated in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). This balancing process involves characterizing and then quantifying the interests at stake. The court below erred in the way it took both steps and, consequently reached an improper conclusion.

A. The impact of the state's funding decision on plaintiffs' choice was improperly characterized and weighed by the district court.

After concluding that *Poelker* was not on point, the district court applied a legal analysis relying on other Supreme Court cases. This second essential step of the district court's analysis addresses two principal concepts. The first is the nature of the women's interest in a choice in the circumstances of pregnancy as described principally in *Roe v. Wade*, 410 U.S. 113

(1973) and *Maier v. Roe*, 432 U.S. 464 (1977). The second is the state's interest which may justify influencing that choice as described principally in the same decisions. While defendant does not take issue with the district court's characterization of the individual decisions, the relationship of the facts actually before the court to the legal principles enunciated in these decisions appears unduly shaped by a fundamental misapplication of the law.

Of critical importance is the nature of the governmental influence on the choice of the pregnant woman. The court below characterized the governmental funding decisions embodied in the law as having the consequence that "the mother may be subjected to considerable risk of severe medical problems, which may even result in her death." 469 F. Supp. at 1219. This is the effect of the Medicaid program, as characterized by the court below, that was then weighed in the constitutional balance: the financial coverage of the program "subjected" women to "considerable risks."

This description of the effect of the legislative funding decisions flies in the face of the clear and repeatedly made distinction in *Maier* between "undue burdens" and "allocation of public funds."

[The abortion related constitutional right recognized in *Roe v. Wade*] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

The Connecticut regulation before us is different in kind from the laws invalidated in

our previous abortion decisions. The Connecticut regulation places no obstacles — absolute or otherwise — in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth: she continues as before to be dependent on private sources for the service she desires. The state may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*. 432 U.S. 473-474 (footnote omitted).

In support of its contrary conclusion the lower court also relied on *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). This case only by attenuated analogy is arguably supportive of the conclusion reached. Its premise and essential point of departure is the right to interstate travel and the burdens that may permissibly be placed thereon. The existence of a right and a cognizable burden are the essential elements of the analysis. The court below erred in implying both to exist in the instant case. Neither, in fact or law, exist.

First, there is no constitutional right to "necessary" medical care under the Medicaid program. *Maier v. Roe*, 432 U.S. at 469; See also fn 11 *infra*. The right to choose an abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973), is not the same as the right to

have the government pay for the effectuation of such a choice. *Maier, supra*. The question then becomes whether the burden imposed in any way affects a constitutionally vested right. To this question this court has provided an unequivocal answer: "The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created *nor in any way affected* by the [challenged] regulation. We conclude that the ... regulation does not infringe upon the fundamental right recognized in *Roe*" 432 U.S. at 474 (footnote omitted) (emphasis supplied).

The court below did not address this language in its opinion or explain how the holding of *Maier* and *Memorial Hospital* should be read to reach its own conclusion. It could not. It could not because the statement quoted *supra* is explained by the court as not at all diminished or circumscribed by *Memorial Hospital*: "Appellees' reliance on the penalty analysis of *Shapiro [v. Thompson]*, 394 U.S. 618 (1967) and *Maricopa County* is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right We find no support in the right to travel cases for the view that Connecticut must show a compelling interest for its decisions not to fund elective abortions." 432 U.S. at 474 fn. 8.

Therefore, there being no right infringed upon and no cognizable burden imposed, the court below fundamentally erred in framing the question before it.

Poelker and *Maier* have foreclosed the instant claim.

In sum, in quantifying the impact the federal and state funding decisions have had, the district court

supplied and weighed an effect ("subjected") at variance with this court's definition of the cognizable legal impact. There is none. There is no cognizable disparate treatment. Therefore, *no* equal protection analysis applies.

B. The state's legitimate interests are improperly characterized and diminished by the district court.

Additionally, the opinion of the district court gives too little "weight" to the governmental interest in the life of the fetus by an unduly narrow reading of *Roe v. Wade*. The district court states its conclusion concisely: "We cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women." 469 F. Supp. at 1220.

Again the court below substituted its own estimation of the legitimacy of the state's interest for established, authoritative precedent. In *Maier* the legitimate interest of the state is determined as summarized from other cases: "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' an interest honored over the centuries." 432 U.S. at 478 (citation and footnote omitted).

Further, the court below erred in applying the balancing process required by *Maier*: quantifying and weighing the interest of the women and then quantifying and weighing the interest of the state separately. Because it apparently felt the burden on the women, in its opinion, was too great, it wished to reach the conclusion that the legislation was un-

constitutional. It was foreclosed however from finding the funding decision of the legislature to be too burdensome because *Maier* says it imposes "no restriction." It, therefore, in describing the *state's* interest uses as the critical element the *women's* health. The integrity of the reasoning process set forth in *Maier* is abandoned to reach a result contrary to the holding of *Maier*.

In sum, the opinion of the district court, by improperly directly applying the holding of *Wade* and *Maier* has compounded its initial critical error of improperly overvaluing the interest of the women in securing new coverage for public aid programs. See, sec. II-A, *supra*.

The relationship thus established by the district court's analysis is signally at variance with the Supreme Court's legal standards. Amici submit that the required weighing of the interests consistent with properly applied legal precedent sustains the minor incremental choice influencing action of the legislatures at issue here.

III. Supreme Court Precedent Supports The Funding Decisions Made By The Federal And Illinois Legislatures.

Amici submit that a proper reading of Supreme Court precedent supports the choice the federal and Illinois legislatures have made in determining what types of services to include in the Medical Assistant Program. The outline of Amici's legal analysis has been sketched in the foregoing close analysis of the opinion of the district court. An affirmative statement may additionally summarize and perhaps clarify Amici's position.

First, the Supreme Court in *Poelker* sustained the constitutionality of a regulation which excluded "medically necessary" abortions from a program providing a broad range of medical assistance.

- the regulation was more restrictive than the regulation challenged in the instant case
- the regulations excluded, and the plaintiff class therefore included, women for whom abortions were "medically necessary"
- the named plaintiff had been told to secure an abortion as a prerequisite to a "required" medical procedure
- the same constitutional principles were advanced by plaintiffs as supporting relief
- the regulation was sustained by this court

Therefore, *Poelker* is controlling precedent.

Second, even without the definitive holding of *Poelker* rejecting plaintiff's claims, other Supreme Court precedent does not support the district court's analysis. In balancing the woman's interest against the state's the following legal principles apply:

- the woman's interest as properly defined in *Maier*, (432 U.S. at 474), is not at all additionally restricted by the legislatures' funding decisions
- the attendant legally cognizable difficulty indigent women may have in securing medically necessary abortions is not "in any way affected" by the

legislatures' positive funding decisions
Id.

- the status accorded health considerations in the context of the criminal statute in *Roe v. Wade* is inapposite in the context of legislative positive funding decisions
- there is no constitutional principle that requires that all "medically necessary" services of a particular kind be included if allegedly similar services are already provided^{11/}
- a state's interest in protecting the potential life of the fetus as advanced here is valid, strong, and legitimate, *Maier*, 432 U.S. at 478
- Illinois' funding of its Medical Assistance Program rationally furthers that interest, *Id.*

Therefore, other controlling Supreme Court precedent far from providing a sound basis for the district court's decision, foreclose both its analysis and conclusion. There is, in fact and in law, no appellate

^{11/}*Cf. Legion v. Richardson*, 354 F. Supp. 456 (S.D. N.Y. 1973) (three judge panel) *aff'd sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973), *rehearing denied*, 415 U.S. 939 (1974) (upheld exclusion of under age 65 patients from coverage in an institution for tuberculosis or mental diseases contained in 42 U.S.C. sec. 1396d (a) (15) (B) (1970) although virtually all other diseases and other ages are covered); *Kantrowitz v. Weinberger*, 388 F. Supp. 1127, 1130 (D. D.C. 1974) (sustaining same statute against different Equal Protection argument) (considered *Legion*, *supra*, "controlling" precedent).

support for plaintiffs' position. Amici's legislative mandate is, however, manifestly squarely within the law.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed and remanded with the determination that plaintiffs have failed to establish a violation of the constitution caused by the legislatures' determinations regarding the use of public funding for health care.

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APPENDIX

INDEX TO APPENDIX

	<i>Page</i>
1. Complaint in <i>Doe v. Poelker</i>	1
2. Affidavit of Plaintiff, Jane Doe in <i>Doe v. Poelker</i>	7
3. Plaintiff's Interrogatories Directed to Defendant John H. Poelker.....	10
4. Answers to Interrogatories.....	11

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

JANE DOE,

Plaintiff,

vs.

JOHN H. POELKER, MAYOR OF THE
CITY OF ST. LOUIS, MISSOURI,

and

R. DEAN WOCHNER, M.D., DIRECTOR
OF THE DEPARTMENT OF HEALTH
AND HOSPITALS AND ACTING HOSPITAL
COMMISSIONER OF THE CITY OF ST.
LOUIS, MISSOURI,

Defendants.

CAUSE NO. 73C 565 (A)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Comes now plaintiff and for her cause of action
states:

I. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Section 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; and under United States Code, Title 42, Chapter 21, Section 1983.

2. The defendants are residents of and are to be found within this federal judicial district and division.

3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions.

II. PARTIES

4. Plaintiff, JANE DOE, is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harrassment and is available to the Court at its order and convenience.

5. Plaintiff resides with her husband and their two children, both of whom are over seven years of age.

6. Plaintiff's husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. Plaintiff and her husband cannot afford the expense of another child and plaintiff's consequential loss of employment. Plaintiff and her family are in severe, financial straits and plaintiff is the holder of a City of St. Louis hospital clinic card.

7. Since 1965 plaintiff has incurred a minimum of five miscarriages and is presently pregnant and within the first trimester of said pregnancy.

8. During the month of August, 1973, plaintiff on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

9. Said refusals were based upon the stated policy of said hospitals, as expressed by said physicians, the same being a blanket prohibition against performing abortions.

10. Plaintiff suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then to return to said hospital for an hysterectomy, involving the permanent removal of plaintiff's uterus, oviducts and ovaries, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

11. The ordinary and routine medical procedure in plaintiff's situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to plaintiff.

12. Plaintiff brings this cause of action on her own behalf and on behalf of the entire class consisting of pregnant, women residents of the City of St. Louis, Missouri desiring to utilize the personnel, facilities and services of the general, public hospitals within the City of St. Louis, Missouri, for the medical termination of said pregnancy. Said class of pregnant, women

residents is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class and the claims of plaintiff are typical of the claims of the class. Plaintiff will fairly and adequately represent the interests of the class.

13. Defendant, JOHN H. POELKER, is the duly elected and acting mayor of the City of St. Louis, Missouri, in said capacity is the chief executive officer of the same and as such exercises control and authority, both express and implied, over the Director of Health and Hospitals, the Health Commissioner and the general, public hospitals of said City, all of whom have a role in the existence, application, implementation and enforcement of the said policies, rules, regulations, procedures and practices herein challenged. Said defendant has on numerous past occasions publicly stated that the medical procedure of abortion will not be allowed in said city's general, public hospitals and the force and weight of his office and statements are largely responsible for the existing situation.

14. Defendant, R. DEAN WOCHNER, M.D., is the duly appointed and acting Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri and in said capacities is the principal and chief medical official of the same, having the authority and responsibility of creating, defining, applying, implementing and enforcing all said city's medical policies, rules, regulations, procedures and practices affecting the operation of said city's general, public hospitals, including those herein challenged.

III. CAUSES OF ACTION

15. Said express and implied policies, rules, regulations, procedures and practices herein challenged:

a. Interfere with and deprive plaintiff and her respective physician of the right to privacy within the patient-physician relationship and infringe upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

b. Interfere with and deprive plaintiff of her right to obtain and to receive reasonable, medical services according to the highest standards of medical practice, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

c. Interfere with and deprive plaintiff of the fundamental rights of a woman to determine for herself whether to bear children and to maintain her marital privacy in matters respecting marriage, family, sex and procreation, the same being protected and guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

d. Interfere with and deprive plaintiff of the right to receive safe and adequate medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

e. Interfere with and deprive plaintiff of the equal protection of the laws by treating similarly situated classes differently and discriminatorily with no compelling justification for said classification, the same being protected and guaranteed by the Fourteenth Amendment to the United States Constitution; and

f. Interfere with and deprive plaintiff of due process of law by arbitrarily denying her the medical procedure of abortion without justification or cause, thereby subjecting her life and liberties to increased possibility of loss.

V. RELIEF PRAYED

WHEREFORE, plaintiff prays this Court:

16. Issue a declaratory judgment holding that any and all express or implied policies, rules, regulations, procedures and practices, barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri for the performance of abortions are in violation of the constitutional rights of plaintiff and the class of women similarly situated, as protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

17. Issue a permanent injunction restraining defendants, their agents, employees, appointees and successors from applying, implementing and enforcing or threatening to apply, to implement or to enforce said policies, rules, regulations, procedures and practices herein challenged in derogation of the rights of plaintiff and said class, inasmuch as plaintiff and said class have no clear nor adequate remedy at law and

the continued acts of defendants, if not restrained, will continue to cause irreparable harm and injury to plaintiff and said class.

18. Issue such other and further orders and relief as to the Court may seem meet and proper and to tax all costs herein to defendants.

/s/ signature

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,
Plaintiff,

vs.

JOHN H. POELKER, MAYOR
OF THE CITY OF ST. LOUIS,
MISSOURI, *et al.*,
Defendants.

Cause No. 73C 565 (A)

AFFIDAVIT OF PLAINTIFF, JANE DOE

Comes now Affiant, JANE DOE, and states that she submits this Affidavit in support of "Plaintiff's Motion For Summary Judgment" to which it is attached as "Exhibit A" and made a part thereof. Said Affiant further states:

1. She is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harrassment and is available to the Court at its order and convenience.

2. She resides with her husband and their two children, both of whom are over seven years of age and under sixteen years of age.

3. Her husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. She and her husband cannot afford the expense of another child and plaintiff's consequential

loss of employment. She and her family are in severe, financial straits and she is the holder of a City of St. Louis hospital clinic card.

4. Since 1965 she has incurred a minimum of five miscarriages and at the time of filing this cause was pregnant and without the first trimester of said pregnancy.

5. During the month of August, 1973, she on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

6. Said refusals were based upon the stated and admitted policy of said hospitals, as expressed by said physicians; the same being a blanket prohibition against performing abortions.

7. She suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then to return to said hospital for an hysterectomy, involving the permanent removal of her uterus, oviducts and overies, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

8. She has been advised by a private physician that the ordinary and routine medical procedure in her situation is to perform the abortion and hysterectomy in one surgical proecedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to her.

9. The present and real threat by defendants to implement and to enforce the policy herein challenged deters said plaintiff from receiving medical care in a

/s/ Jane Doe
JANE DOE

On this 4th day of October, 1973, personally appeared before me, an adult female, who being first duly sworn upon her oath did state that she is the plaintiff in the above encaptioned cause, that the above and foregoing Affidavit and the statements contained therein are true to the best of her knowledge, information and belief and that she executed the same as her free act and deed and in the pseudonym of "JANE DOE".

Subscribed and sworn to before me on the day and
year last above written

/s/ signature
Notary Public

My Commission Expires: June 26, 1976

JANE DOE,
Plaintiff,

vs.

JOHN H. POELKER, MAYOR OF
THE CITY OF ST. LOUIS, MISSOURI

and

**R. DEAN WOCHNER, M.D.,
DIRECTOR OF THE DEPARTMENT
OF HEALTH AND HOSPITALS AND
ACTING HOSPITAL COMMISSIONER
OF THE CITY OF
ST. LOUIS, MISSOURI,
Defendants.**

Cause No. 73C 565 (A)

**PLAINTIFF'S INTERROGATORIES
DIRECTED TO DEFENDANT
JOHN H. POELKER**

Comes now plaintiff and pursuant to Rule 33 of the Federal Rules of Civil Procedure propounds the following interrogatories to defendant Poelker.

1. State for each policy, rule, regulation, procedure, and practice which exists governing the performance or the rendering of medical abortions at public hospitals within the City of St. Louis, Missouri:
 - a. The date enacted or propagated;
 - b. The exact wording or context of the same;

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,
Plaintiff,

vs.

JOHN H. POELKER, MAYOR
OF THE CITY OF
ST. LOUIS, MISSOURI, ET AL.,
Defendants.

Cause No. 73C 565 (A)

ANSWERS TO INTERROGATORIES

Comes now, John H. Poelker, Mayor of the City of St. Louis, Missouri, and makes his answers to written interrogatories served with the Complaint and Summons on August 20, 1973.

Respective of the designations identifying the plaintiff's questions, I answer stating as follows, to wit:

1. City Hospital rules and regulations exemplified by "bylaws;"

a.

- i) Max C. Starkloff Hospital; adopted March 1972;
- ii) Homer G. Phillips Hospital; adopted April 29, 1968, and revised May 26, 1971.

b.

i) Max C. Starkloff Hospital:

"PART II — RULES AND REGULATIONS

"E. GENERAL RULES REGARDING
ABORTIONS AND STERILIZATIONS

"If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

"If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

"A valid permission for a sterilization procedure for a married patient requires the written consent of the spouse when available.

"Whenever the married patient claims dissension or for reasons of mental incompetency a notarized affidavit will be submitted in lieu of the spouse's written consent.

"In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

"Therapeutic abortion (the removal with legal justification of the human fetus from its mother prior to viability) will be performed only for medical reasons or indications.

"Prior to the performance of a therapeutic abortion, two consultants must agree in writing that the medical indications justify such procedure."

JAN 10 1980

MICHAEL RUDAK, JR., CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1979

JASPER F. WILLIAMS, M.D. AND
EUGENE F. DIAMOND, M.D.,

Appellants,

and

JEFFREY C. MILLER, Acting Director, Illinois Department of Public Aid,

Appellant,

and

THE UNITED STATES,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States Court for the Northern District of Illinois, Eastern Division.

**MOTION AND BRIEF AMICI CURIAE OF CERTAIN
PHYSICIANS, PROFESSORS AND FELLOWS OF
THE AMERICAN COLLEGE OF OBSTETRICS
AND GYNECOLOGY IN SUPPORT OF THE
APPELLANTS**

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TABLE OF AUTHORITIES

CASE	PAGE
<i>Zbaraz v. Quern</i> , 469 Fed. Supp. (N.D. Ill. 1979)	3
ARTICLES AND BOOKS	
Anderson, <i>Comprehensive Management of the Pregnant Teen-ager</i> , 7 CONTEMPORARY OB/GYN 75 (1975)	4
M. Barnhart, R. Henry, J. Lusher, <i>SICKLE CELL</i> 89 (2d Ed. 1976)	4
Baskin <i>et al.</i> , <i>Low-Dose Heparin for Prevention of Thromboembolic Disease in Pregnancy</i> , 129 AM J. OBSTET. GYNECOL. 590 (1977)	12, 13
R. Berkow, <i>THE MERCK MANUAL</i> 955 (13th ed. 1977)	6, 7, 9, 10, 12
Blattner, <i>et al.</i> <i>Pregnancy Outcome in Women with Sickle Cell Trait</i> , 238 JAMA 1342 (1977)	5
Blinick, <i>et al.</i> , <i>Pregnancy in Narcotics Addicts Treated by Medical Withdrawal</i> , 105 AM. J. OBSTET. GYNECOL. 997 (1969)	6
Blinick, <i>et al.</i> , <i>Methadone Maintenance, Pregnancy and Progeny</i> , 225 JAMA 477 (1973)	6
Briggs, Herren, <i>et al.</i> , <i>Pregnancy in the Young Adolescent</i> , 84 AM. J. OBSTET. GYNECOL. 436 (1962)	4
Carr, <i>Managing Iron Deficiency in Pregnancy</i> , 4 CONTEMPORARY OB/GYN 15 (1974)	9
Clark, Wong, <i>et al.</i> , <i>The Pregnant Adolescent</i> , 142 ANN. N.Y. ACAD. SCI. 813 (1970)	4
Coustan and Lewis, <i>Clinical Approaches to Diabetes in Pregnancy</i> , 7 CONTEMPORARY OB/GYN 27 (1976)	6, 13
Cranley, <i>Managing Varicose Veins in Pregnancy</i> , 7 CONTEMPORARY OB/GYN 143 (1976)	11
Dilts and Fort, <i>Medical and Social Factors Affecting Eclampsia</i> , 4 CONTEMPORARY OB/GYN 57 (1974)	10
Dott and Fort, <i>Medical and Social Factors Affecting Early Teenage Pregnancy</i> , 125 AM. J. OBSTET. GYNECOL. 532 (1976)	4

	PAGE
Duhring, <i>Diabetes in Pregnancy: How to Diagnose and Treat It</i> , 9 CONTEMPORARY OB/GYN 117 (1977)	13
Dwyer, <i>Managing the Teenage Pregnancy</i> , 12 OB-GYN OBSERV. 2 (1975)	4
Fiakpui and Moran, <i>Pregnancy in the Sickle Hemoglobinopathies</i> , 11 JOURNAL OF REPRODUCTIVE MEDICINE 28 (1973)	4, 5
Flesa, et al., <i>Thromboembolic Disorders in Pregnancy: Pathophysiology Diagnosis and Treatment with Emphasis on Heparin</i> , 17 CLINICAL OBSTETRICS AND GYNECOLOGY 215-216 (1974)	12
Flessa, <i>Hemorrhagic Disorders and Pregnancy</i> , 17 CLINICAL OBSTETRICS AND GYNECOLOGY 238 (1974)	9
Freund, et al., <i>Hemodynamic and Metabolic Studies of a Case of Toxemia of Pregnancy</i> , 127 AM. J. OBSTET. GYNECOL. 206 (1977)	10
Gabbe, <i>New Ideas on Managing the Pregnant Diabetic Patient</i> , 13 CONTEMPORARY OB/GYN 109 (1979)	12
Gallus, et al., <i>Prevention of Venous Thrombosis with Small Subcutaneous Doses of Heparin</i> , 235 JAMA 1980 (1976)	12
Gant, et al., <i>Clinical Management of Pregnancy-Induced Hypertension</i> , 21 CLINICAL OBSTETRICS AND GYNECOLOGY 397 (1978)	10
Morger, <i>Hemoglobinopathies in Pregnancy</i> , 17 CLINICAL OBSTETRICS AND GYNECOLOGY 139-143 (1974)	5
Horger, <i>Managing the Patient with Sickle Cell Disease</i> , 2 CONTEMPORARY OB/GYN 55 (1973)	5
Houde and Conway, <i>Teen-age Mothers: a Clinical Profile</i> , 7 CONTEMPORARY OB/GYN 71 (1976)	4
D. Ian, <i>PRACTICAL OBSTETRIC PROBLEMS</i> (5th ed. 1979)	6, 8, 9, 10, 13
Ismach, <i>Diabetes in Pregnancy: New Group Discusses Management Problems</i> , 11 CONTEMPORARY OB/GYN 31 (1978)	13
Isreal and Woutersz, <i>Teenage Obstetrics</i> , 85 AM. J. OBSTET. GYNECOL. 869 (1963)	4

	PAGE
Kitay, <i>Assessing Anemia in the Pregnant Patient</i> , 2 CONTEMPORARY OB/GYN 17 (1973)	9
Kitay, <i>Bleeding Disorders in Pregnancy</i> , 7 CONTEMPORARY OB/GYN 88 (1976)	6
Kitay, <i>Folic Acid Deficiency</i> , 10 CONTEMPORARY OB/GYN 30 (1977)	9
Lindheimer and Davison, <i>Renal Disease in Pregnant Women</i> , 21 CLINICAL OBSTETRICS AND GYNECOLOGY 420 (1978)	13
Linzey, <i>Controlling Diabetes with Continuous Insulin Infusion</i> , 12 CONTEMPORARY OB/GYN 43 (1978)	13
Levin and Tabanao-Mahusey, <i>Sickle Cell Disease in Pregnancy: A Report on Exchange Transfusion</i> , MARYLAND STATE MEDICAL JOURNAL 75 (1969)	5
Levin and Colea, <i>When Pregnancy Complicates Chronic Granulocytic Leukemia</i> , 13 CONTEMPORARY OB/GYN 49 (1979)	12
Messer, <i>Pregnancy Anemias</i> , 21 CLINICAL OBSTETRICS AND GYNECOLOGY 163-179 (1978)	9
R. Messer, <i>Medical Indications For Pregnancy Interruption</i> , PREGNANCY TERMINATION 309 (1st 1979)	12
Newman, <i>Pregnancies of Methadone Patients</i> , 74 NEW YORK STATE JOURNAL OF MEDICINE 52 (1974)	6
Newman, et al., <i>Results of 313 Consecutive Live Births in the New York City Methadone Maintenance Treatment Program</i> , 121 AM. J. OBSTET. GYNECOL. 233 (1975)	6
Noller, et al., <i>Managing von Willebrand's Disease During Pregnancy</i> , 4 CONTEMPORARY OB/GYN 107 (1974)	10
O'Reilly, <i>Problems of Hemorrhage and Thrombosis in Pregnancy</i> , 2 CLINICAL HEMATOLOGY 553 (1973)	9
Perlmutter, <i>Drug Addiction in Pregnant Women</i> , 89 AM. J. OBSTET. GYNECOL. 569 (1967)	6
Pritchard and Pritchard, <i>Standardized Treatment of 154 Consecutive Cases of Eclampsia</i> , 123 AM. J. OBSTET. GYNECOL. 543 (1975)	10

Sarrel and Klerman, <i>The Young Unwed Mother</i> , 105 AM. J. OBSTET. GYNECOL. 575 (1969)	4
Sheehy, <i>An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia</i> , 75 AM. J. OBSTET. GYNECOL. 789 (1958)	12
Sims, <i>Serial Studies of Renal Function in Pregnancy Complicated by Diabetes Mellitus</i> , 10 DIABETES 190 (1961)	13
Statzer and Wardell, <i>Heroin Addiction During Preg- nancy</i> , 113 AM. J. OBSTET. GYNECOL. 273 (1972)	6
Stern, <i>The Pregnant Addict</i> , 14 AM. J. OBSTET. GYNECOL. 253 (1966)	6
Stimmel and Adamson, <i>Narcotic Dependency in Preg- nancy: Methadone Maintenance Compared to the Use of Street Drugs</i> , 235 JAMA 1121 (1970)	6
Stone, et al., <i>Narcotics Addiction in Pregnancy</i> , 190 AM. J. OBSTET. GYNECOL. 718 (1971)	6
Tunick, <i>An Internist Looks at Varicose Veins</i> , 11 CONTEMPORARY SURGERY 112 (1977)	11
Ueland, <i>Cardiovascular Diseases Complicating Preg- nancy</i> , 21 CLINICAL OBSTETRICS AND GYNECOLOGY 431 (1978)	7, 8
Ueland, <i>What's the Risk when the Cardiac Patient is Pregnant</i> , 13 CONTEMPORARY OB/GYN 119 (1979)	7, 8
Wallach, et al. <i>Pregnancy and Menstrual Functions in Narcotics Addicts Treated with Methadone</i> , 105 AM. J. OBSTET. GYNECOL. 1226 (1969)	6
Webb, Briggs, Brown, <i>A Comprehensive Adolescent Maternity Program in a Community Hospital</i> , 84 AM. J. OBSTET. GYNECOL. 442 (1962)	4
Zaeckler, Adelman, et al., <i>The Young Adolescent as an Obstetrical Risk</i> , 103 AM. J. OBSTET. GYNECOL. 305 (1969)	4
Rothfield and Chao, <i>The Effects of SLE on Preg- nancy</i> , 10 CONTEMPORARY OB/GYN 64 (1977)	10
Zuspan, <i>Problems Encountered in the Treatment of Pregnancy Induced Hypertension</i> , 131 AM. J. OB- STET. GYNECOL. 591 (1978)	10

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-4, 79-5, and 79-491

JASPER F. WILLIAMS, M.D. AND
EUGENE F. DIAMOND, M.D.,

Appellants,

and

JEFFREY C. MILLER, Acting Director, Illinois De-
partment of Public Aid,

Appellant,

and

THE UNITED STATES,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on
their own behalf and on behalf of all others similarly
situated; CHICAGO WELFARE RIGHTS ORGANIZA-
TION, an Illinois not-for-profit corporation, and JANE
DOE, on her own behalf and on behalf of all others
similarly situated,

Appellees.

On Appeal from the United States Court for the
Northern District of Illinois, Eastern Division.

**BRIEF AMICI CURIAE OF CERTAIN
PHYSICIANS, PROFESSORS AND FELLOWS OF
THE AMERICAN COLLEGE OF OBSTETRICS
AND GYNECOLOGY IN SUPPORT OF THE
APPELLANTS**

ARGUMENT

Interest of the Amici

Three hundred five obstetricians and gynecologists respectfully file their brief as *amici curiae* in the instant case. The consent of all parties of record was duly requested for the filing of this *amicus* brief in support of the appellants. All parties have given their consent for the filing of this brief. Letters of consent have been filed with the Clerk of this Court.

These *amici*, all obstetricians and gynecologists, seek to bring before this Court information regarding the commonly accepted alternative medical treatment for the diseases and conditions that are discussed in the opinion of the district court and contained in the record before that court.

These *amici* submit that this information is substantively critical in this Court's consideration of the instant case because the opinion of the district court implies that, if abortion is not sanctioned by this Court, the morbidity and mortality among indigent women will be increased. These *amici* submit that contrary to accepted medical facts, the district court was erroneously led to believe that abortion is the medically indicated treatment for a wide variety of diseases and medical conditions and that alternative treatment is not available for these diseases and conditions. These *amici* submit that the overwhelming weight of medical literature refutes the basis of the opinion of the district court.

EXISTING MEDICAL ART AND TECHNOLOGY, INDEPENDENT OF ABORTION, IS EFFECTIVE IN THE CARE AND TREATMENT OF EACH OF THE CONDITIONS AND DISEASES RELIED UPON IN THE DECISION OF THE DISTRICT COURT AS NECESSARY INDICATIONS FOR ABORTION.

These *amici* submit that the opinion and affidavits in *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill. 1979), do not present a comprehensive, medically accepted analysis of the various means available for treating pregnant women who suffer from given diseases. Particularly, the opinion and affidavits create the inaccurate impression that abortion is the only effective means of treatment for many diseases and medical conditions. Medical literature, however, demonstrates that effective alternative treatments exist for the diseases or conditions referred to in the opinion of the district court and in plaintiffs' affidavits.

The use of these medically accepted treatments would prevent the increased morbidity and mortality among indigent pregnant woman that the district court found likely to be the result of the restriction of federal and state funding of abortion to life-endangering situations. In many instances the medically available treatments for said diseases and conditions are more beneficial to the continued health and well-being of the pregnant woman than abortion. Moreover, reimbursement is provided under Medicaid for these accepted treatments.

As physicians specializing in obstetrical practice, these *amici* further submit that the medical and scientific premises upon which the district court based its decision are both inadequate and misleading since they do not adequately reflect the customary and usual medical assessment of both individual risk and the present state of

medical act regarding alternative forms of treatment. These *Amici* have reviewed the relevant medical literature for the conditions mentioned in the opinion, as well as the affidavits submitted by the appellee. Moreover, these *amici* also have reviewed other conditions considered to be indicative of high risk pregnancy in arriving at their conclusions we present our findings to the Court:

Teenage Pregnancy. The quantity and quality of prenatal care have a direct and significant effect on the pregnant woman and her offspring. The most striking examples of the value of prenatal care occur in teenage pregnancies. The unique medical problems of the pregnant teenager can be controlled and the results of proper prenatal care prove to be no different from that in the general population.^{1 2 3 4 5 6 7 8 9 10} These results show the benefits of proper pre-natal care for the pregnant teenager. There are no studies indicating any medical benefits of abortion for the pregnant teenager, nor is abortion recommended as the form of treatment. Many health problems prevalent among teenagers can be diagnosed and treated concurrently with pregnancy; such treatment may not occur should the patient choose abortion.

Sickle Cell Hemoglobinopathy. Sickle cell anemia, a genetic disease most prevalent among Blacks, presents another kind of pregnancy-related problem that is amenable to proper prenatal care and supervision. Clinical management of the pregnant woman with sickle cell hemoglobinopathy is based on (1) prevention of infection, (2) prevention of crises, and (3) maintenance of adequate hematocrit and hemoglobin levels.^{11 12}

¹ Footnotes set out in full as an Appendix (See pp. 1a thru 6a).

"The need for a concentrated effort to prevent infection in the Sickle Cell patient and to treat it aggressively once it occurs cannot be over-emphasized."¹³ The results of a study at Chicago Lying-In Hospital showed *no* maternal deaths resulting from pregnancy in sickle cell patients.

Proposed treatment for sickle-cell anemia includes 1) Close observation and frequent visits to a physician; 2) Folic acid supplements; 3) Transfusions as necessary. (Exchange transfusions have been advocated and may be a viable adjunct to management. Partial exchange transfusions to prevent crises may also be of benefit.¹⁴ 4) Anesthesia should be administered with great care to avoid hypoxia; 5) Early delivery should be considered; 6) Plain crises can be easily managed with heparin.^{15 16}

Although the Depp Affidavit in the Appendix of Parties indicates otherwise, persons with the sickle cell trait (AS) are not predisposed to an increased complication rate. "This conclusion supports a long-standing clinical impression of the essentially benign nature of the AS condition."¹⁷ Abortion is not medically indicated for the pregnant sickle cell patient.

Drug Addiction. The pregnant addict presents an example of the greater, beneficial effects, both short term and long term, of conventional treatment as opposed to abortion.

In ten studies of pregnancy in women either addicted to narcotics or being treated for narcotics addiction (*e.g.*, via methadone and/or withdrawal) no evidence indicates that pregnancy has an adverse effect upon the disease process, nor is there any indication of increased maternal mortality due to pregnancy complicated by addiction or treatment. Quite the contrary, these studies show a maternal mortality of virtually *zero* and indicate that

pregnancy may exert a beneficial effect on maternal health by encouraging women to enter and remain part of addiction treatment programs both pre- and post-partum^{18,27} Although these studies revealed increased maternal complications, there is no significant evidence that these complications resulted from pregnancy as opposed to drug addiction. The maternal benefits in overall health far outweigh the risks of pregnancy complications. Abortion is not medically indicated for the pregnant drug addict.

Placenta Previa. Placenta previa is defined as "implantation of the placenta over or near the internal os of the cervix."²⁸ If the cervix were to dilate (or be dilated) too early, severe bleeding could occur. The placenta can be easily localized using ultrasound or other non-invasive techniques.

Placenta previa most often occurs as an ante-partum hemorrhage. The patient should be immediately admitted to the hospital and placed on strict bed rest. "Until recently, ante-partum hemorrhage came fourth in the list of causes of maternal death. Much of this is preventable with proper antenatal supervision and institutional care. The majority of deaths from placenta previa are due to mismanagement."²⁹ Delivery via cesarian section is advised. Abortion is not medically indicated for placenta previa.

Abruptio placenta is the premature separation of a normally implanted placenta from the uterus.³⁰ Bed rest is advisable, unless bleeding becomes severe, in which case vaginal or cesarian delivery should be attempted.^{31 32 33} Proper delivery at this stage would be appropriate—not abortion.

Cardiovascular disease. "The mainstay of medical management for the pregnant cardiac patient is rest and

reassurance; rest in bed at home or prolonged hospitalization is necessary should clinical indications dictate."

"Pregnancy increases cardiac work, therefore one must attempt to limit other demands placed on the heart."^{34 35}

The New York Heart Association has defined four functional classes of cardiovascular disease.³⁶

- Class 1. Asymptomatic
2. Symptomatic with heavy exercise
3. Symptomatic with light exercise
4. Symptomatic at rest

Restriction of activity decreases the burden on the heart while support and reassurance decrease the cardiac stress of fear and anxiety. Usually the physician is most concerned about abrupt changes in class 1 or 2 advancing to class 3 or 4, a common occurrence in patients with mitral stenosis.³⁷

Measures indicated to decrease cardiac work include:

- 1.) Elastic support for the legs throughout pregnancy if the patient is ambulatory.
2. Prophylactic antibiotic therapy (Gentamicin/Ampicillin or similar broad spectrum combinations).
3. Prompt treatment of urinary tract infections (UTI) and respiratory infections.
4. *Moderate* sodium restriction.
5. Oral iron to avoid anemia (a decreased number of red blood cells requires increased cardiac work to circulate them.)
6. Frequent visits to cardiologist and obstetrician/gynecologist (this serves to decrease both stress and anxiety and the risks of undetected infection.)³⁸

Most drugs used to improve heart function can be used during pregnancy. These include, primarily, drugs

such as digitalis. Diuretics, oral anticoagulants, and propranolol are *not* recommended during pregnancy, but they can be replaced with comparable, safer medication.³⁹ While pregnancy *does* increase cardiac work, there is nothing to indicate that pregnancy increases the severity of cardiac disease.⁴⁰

Surgical intervention for pregnancy termination is not recommended in many cases purely for reasons of maternal health.

Termination within the first trimester of pregnancy is less dangerous than formerly in these days of vacuum aspiration and wholesale abortion in early pregnancy but in fact there is seldom a straight indication for it. Barnes stated that since 1954 he had only recommended termination in one out of 535 cases of rheumatic heart disease (and she refused). For the patient who is not in cardiac failure there is no need to terminate and if she is in failure termination is next door to manslaughter. . .

On no account may obstetrical intervention be undertaken until the patient's cardiac failure is under control, although the situation may seem so grim that one may be tempted to interfere. To do so would simply seal the patient's fate. Once failure has been controlled, however, the *need* to intervene in the pregnancy has passed. [Emphasis added.]⁴¹

Three additional points should be made clear. (1) Pregnancy is *not* a contraindication for cardiac surgery, provided the operation is really needed.⁴² (2) Pregnancy is often the only period when the woman with cardiac disease gets proper attention and treatment for her condition. (3) Abortion is not the appropriate treatment for the pregnant patient with cardiac disease.

Anemia. Three types of anemia in pregnancy are known (not including infection, trauma and/or congenital defects). Iron deficiency anemia can be treated by iron administration. Oral administration is the method of choice using ferrous sulfate, ferrous gluconate or ferrous fumarate. Parenteral administration is the next likely choice followed by blood transfusion if other methods fail.^{43 44 45 46 47} Megaloblastic anemia is the result of folic acid deficiency and can be treated with folic acid, 1 mg. b.i.d.^{48 49 50} Aplastic anemia is, like hemolytic anemia, "in no way peculiar to pregnancy."⁵¹ Pregnancy with pre-existing aplastic anemia does not adversely affect the course of the disease, long-term outlook being poor in any case.⁵² Bleeding occurring as a result of the abortion procedure would only aggravate the anemic state. "The essential therapy for aplastic anemia is whole blood transfusion in order to prolong life until the bone marrow resumes its function. . . . Drugs that might be injurious to the marrow should be avoided, and substances that might stimulate the marrow (e.g., androgens, corticosteroids) should be tried."⁵³ Abortion is not medically indicated for anemia.

Idiopathic thrombocytopenic purpura. Idiopathic thrombocytopenic purpura (ITP) is the most common form of thrombocytopenia and occurs as the result of platelet destruction. Primary treatment is with corticosteroids. Splenectomy, the second level of treatment, is not recommended for pregnancy unless steroids have failed and bleeding is life-threatening.⁵⁴ The third stage of treatment involves immunosuppressive therapy.^{55 56 57} Vincristine may be of some value and platelet concentrates are recommended to control bleeding.⁵⁸ Abortion is not medically indicated.

Von Willebrands Disease (A Deficiency of Blood Factor VIII). Von Willebrands disease is thought to be "the most common inherited bleeding disorder in women."⁶⁰ The disease can be treated by an infusion of cryoprecipitate of plasma if levels of factor VIII are low at term.^{60 61 62} "Complications often can be avoided by performing coagulation studies throughout pregnancy . . ."⁶³ and by following other precautions routine for this condition. Abortion is not medically indicated.

Toxemia of Pregnancy (referred to in plaintiffs' affidavit as pre-eclampsia) "Treatment [of pre-eclampsia] is aimed at preserving the life and health of the mother; the fetus usually also will survive."⁶⁴ Mild pre-eclampsia may be treated by bed rest on an outpatient basis provided the woman visits her physician often. If her condition does not improve immediately, hospitalization is indicated. Parkland Memorial Hospital standardized the treatment for toxemia and its more severe form, eclampsia.⁶⁵ Definitive therapy consists of: 1) prevention or control of convulsions by parenteral use of magnesium sulfate. (note: "MgSO₄ [magnesium sulfate] therapy is easily managed with a minimum of demands upon the physician and a minimum of nursing time"⁶⁶ 2) control of blood pressure using hydralazine hydrochloride usually administered whenever diastolic blood pressure is greater than 110 mmHg. 3) early vaginal delivery. Early delivery is directly indicated after 37 weeks gestation.^{67 68 69 70 71 72} Proper treatment using this regimen produces remarkable results, with many studies demonstrating a maternal mortality rate of zero.^{73 74 75 76} Abortion is not medically indicated for the pregnant patient.

Varicose Veins. Varicose veins may occur during pregnancy, "Yet four months after delivery most of the tortuous saccular varices are gone or at least no longer a cause of such symptoms as fatigue, warmth, itching, night cramps or swelling."⁷⁷ However, varicose veins are not an indication for pregnancy termination. At least six methods of treatment exist: 1) total excision, 2) saphenofemoral ligation, 3) sclerotherapy, 4) ligation and injection of a sclerosing agent into the exposed vein, 5) segmental stripping with multiple ligations, and 6) support with elastic bandages or hose.⁷⁸ Regarding surgical treatment, varicose veins are not considered a serious complication of pregnancy by Cranly et al, since "The combined experience of our associates now exceeds 4,200 women seen for varicose veins, and none of us has operated on the extremities of a patient during pregnancy. Others have reported surgery in pregnant patients, but logic compels us to refrain from performing an *elective* procedure until after the patient has delivered, especially since the associated symptoms can be managed by conservative measures."⁷⁹

Systemic Lupus Erythematosus. Systemic lupus erythematosus (SLE) occurs post-partum and no method for detecting susceptible individuals presently exists. SLE crises can be precipitated by delivery, miscarriage, surgical procedures or therapeutic abortion. Treatment includes aspirin, steroids and prednisone. "It may be less risky for the woman to carry to term than to have an abortion."⁸⁰

Cancer. Cancer-complicating pregnancy can be a serious risk to the woman. However, only specific cancers present an increased risk. "Breast cancer discovered during pregnancy is not an indication for termination. . . .

Previous breast cancer is not an indication for termination."⁸¹ Chronic granulocytic leukemia is another example of a cancer that does not require pregnancy termination. "It is extremely important to realize that not every patient will require treatment during her pregnancy. . . . Therapy can often be delayed until the pregnancy is completed or at least until after the end of the first trimester."⁸² "Pregnancy does not appear to have an adverse effect upon chronic leukemia."⁸³

Thrombophlebitis. "Thrombophlebitis rarely occurs in pregnancy, but is slightly more common post-partum."⁸⁴ The primary goal of treatment is the prevention of thrombosis. This can be accomplished through the use of anti-coagulants such as heparin and warfarin. Warfarin is presently considered the only oral anti-coagulant safe for maternal use.⁸⁵ Thrombophlebitis can be treated by administration of heparin in any of four ways: intermittent intravenous, continuous intravenous, subcutaneous and, "minidose" heparin. (These are, in effect, prophylactic treatments against the possibility of thromboembolism.) Low dose heparin has been shown to be quite efficacious when administered subcutaneously, several studies showing no maternal deaths.^{86 87} Abortion is not medically indicated.

Diabetes. "During the past ten years, important advances have been made in caring for the pregnant woman with diabetes mellitus. Maternal mortality has been all but eliminated and maternal morbidity has been reduced significantly."⁸⁸ The key word in managing the pregnant diabetic is control. "Provided that the patient is well-controlled throughout pregnancy, the diabetic state is not

permanently worsened."⁸⁹ This basic understanding is supported throughout the medical literature.^{90 91 92 93 94} Control can be effectively accomplished by strict regulation of diet, insulin, physical activity, and daily stress.⁹⁵ Class A diabetics can usually be managed by diet alone. Diabetic nephropathy, a matter of concern for the non-pregnant, as well as the pregnant diabetic, does not become aggravated by course of pregnancy. "Sims measured renal function serially in a group of diabetic patients with diabetic nephropathy and found no evidence that pregnancy worsened their renal function."^{96 97} Abortion is not medically indicated.

CONCLUSION

To the extent that the district court's decision holding the Hyde Amendment and the Illinois Funding Law unconstitutional is premised on a position that increased risk of mortality and morbidity in indigent women would result from these funding restrictions, the decision of the district court is unsound. The medical literature clearly establishes the existence of effective alternative medical treatment for which reimbursement is available under federal and state Medicaid programs.

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APPENDIX

1. Isreal and Woutersz, *Teenage Obstetrics*, 85 AM. J. OBSTET. GYNECOL. 869 (1963).
2. Anderson, *Comprehensive Management of the Pregnant Teen-ager*, 7 CONTEMPORARY OB/GYN 75 (1976).
3. Briggs, Herren, *et al.*, *Pregnancy in the Young Adolescent*, 84 AM. J. OBSTET. GYNECOL. 436 (1962).
4. Dwyer, *Managing the Teenage Pregnancy*, 12 OB-GYN OBSERVER 2 (1975).
5. Webb, Briggs, Brown, *A Comprehensive Adolescent Maternity Program in a Community Hospital*, 84 AM. J. OBSTET. GYNECOL. 442 (1962).
6. Houde and Conway, *Teen-age Mothers: a Clinical Profile*, 7 CONTEMPORARY OB/GYN 71 (1976).
7. Sarrel and Klerman, *The Young Unwed Mother*, 105 AM. J. OBSTET. GYNECOL. 575 (1969).
8. Dott and Fort, *Medical and Social Factors Affecting Early Teenage Pregnancy*, 125 AM. J. OBSTET. GYNECOL. 532 (1976).
9. Clark, Wong, *et al.*, *The Pregnant Adolescent*, 142 ANN. N. Y. ACAD. SCI. 813 (1970).
10. Zaeckler, Adelman, *et al.*, *The Young Adolescent as an Obstetrical Risk*, 103 AM. J. OBSTET. GYNECOL. 305 (1969).
11. Fiakpui and Moran, *Pregnancy in the Sickie Hemoglobinopathies*, 11 JOURNAL OF REPRODUCTIVE MEDICINE 28 (1973).
12. M. Barnhart, R. Henry, J. Lusher, *SICKLE CELL* 89 (2d Ed. 1976).
13. *Supra* n. 11 at 34.

14. Morrison and Wiser, *The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated with Sickle Cell Hemoglobinopathies*, 48 OBSTETRICS AND GYNECOLOGY 516 (1976).
15. Horger, *Managing the Patient with Sickle Cell Disease*, 2 CONTEMPORARY OB/GYN 55 (1973).
16. Horger, *Hemoglobinopathies in Pregnancy*, 17 CLINICAL OBSTETRICS AND GYNECOLOGY 139-143 (1974).
17. Blattner, et al. *Pregnancy Outcome in Women with Sickle Cell Trait*, 238 JAMA 1342 (1977).
18. Wallach, et al. *Pregnancy and Menstrual Functions in Narcotics Addicts Treated with Methadone*, 105 AM. J. OBSTET. GYNECOL. 1226 (1969).
19. Blinick, et al., *Methadone Maintenance, Pregnancy and Progeny*, 225 JAMA 477 (1973).
20. Stimmel and Adamson, *Narcotic Dependency in Pregnancy: Methadone Maintenance Compared to the Use of Street Drugs*, 235 JAMA 1121 (1970).
21. Perlmutter, *Drug Addiction in Pregnant Women*, 89 AM. J. OBSTET. GYNECOL. 569 (1967).
22. Statzer and Wardell, *Heroin Addiction During Pregnancy*, 113 AM. J. OBSTET. GYNECOL. 273 (1972).
23. Newman, *Pregnancies of Methadone Patients*, 74 NEW YORK STATE JOURNAL OF MEDICINE 52 (1974).
24. Stone, et al., *Narcotics Addiction in Pregnancy*, 190 AM. J. OBSTET. GYNECOL. 718 (1971).
25. Stern, *The Pregnant Addict*, 14 AM. J. OBSTET. GYNECOL. 253 (1966).
26. Blinick, et al., *Pregnancy in Narcotics Addicts Treated by Medical Withdrawal*, 105 AM. J. OBSTET. GYNECOL. 997 (1969).
27. Newman, et al., *Results of 313 Consecutive Live Births in the New York City Methadone Maintenance Treatment Program*, 121 AM. J. OBSTET. GYNECOL. 233 (1975).

28. R. Berkow, THE MERCK MANUAL 955 (19th ed. 1977).
29. Coustan and Lewis, *Clinical Approaches to Diabetes in Pregnancy*, 7 CONTEMPORARY OB/GYN 427 (1976).
30. *Supra* n.28.
31. D. Ian, PRACTICAL OBSTETRIC PROBLEMS (5th ed. 1979).
32. *Supra* n.31.
33. Kitay, *Bleeding Disorders in Pregnancy*, 7 CONTEMPORARY OB/GYN 88 (1976).
34. Ueland, *Cardiovascular Diseases Complicating Pregnancy*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 431 (1978).
35. Ueland, *What's the Risk when the Cardiac Patient is Pregnant*, 13 CONTEMPORARY OB/GYN 119 (1979).
36. *Supra* n.35.
37. *Supra* n.28 at 961.
38. *Supra* n.34 at 432.
39. *Supra* n.34 at 432.
40. *Supra* n.35 at 117.
41. *Supra* n.31 at 169-170.
42. *Supra* n.31 at 170, 176-177.
43. *Supra* n.31 at 169-170.
44. *Supra* n.28.
45. Messer, *Pregnancy Anemias*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 163-179 (1978).
46. Carr, *Managing Iron Deficiency in Pregnancy*, 4 CONTEMPORARY OB/GYN 15 (1974).
47. Kitay, *Assessing Anemia in the Pregnant Patient*, 2 CONTEMPORARY OB/GYN 17 (1973).
48. *Supra* n.28 at 268.

49. *Supra* n.46.
50. Kitay, *Folic Acid Deficiency*, 10 CONTEMPORARY OB/GYN 30 (1977).
51. *Supra* n.31 at 217.
52. *Supra* n.44.
53. *Supra* n.28 at 270.
54. O'reilly, *Problems of Hemorrhage and Thrombosis in Pregnancy*, 2 CLINICAL HEMATOLOGY 553 (1973).
55. *Supra* n.31.
56. *Supra* n.28.
57. Flessa, *Hemorrhagic Disorders and Pregnancy*, 17 CLINICAL OBSTETRICS AND GYNECOLOGY 238 (1974).
58. *Supra* n.28 at 311.
59. Noller, *et al.*, *Managing von Willebrand's Disease During Pregnancy* 4 CONTEMPORARY OB/GYN 107 (1974).
60. *Supra* n.28 at 315, 316.
61. *Supra* n. 58.
62. *Supra* n.33 at 93.
63. *Supra* n.58.
64. *Supra* n.28 at 953.
65. Pritchard and Pritchard, *Standardized Treatment of 154 Consecutive Cases of Eclampsia*, 123 AM. J. OBSTET. GYNECOL. 543 (1975).
66. Gant, *et al.*, *Clinical Management of Pregnancy-Induced Hypertension*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 397 (1978).
67. Dilts and Jenkins, *Treating Preeclampsia and Eclampsia*, 4 CONTEMPORARY OB/GYN 57 (1974).
68. *Supra* n.64.

69. *Supra* n.65.
70. Zuspan, *Problems Encountered in the Treatment of Pregnancy Induced Hypertension*, 131 AM. J. OBSTET. GYNECOL. 591 (1978).
71. Freund, *et al.*, *Hemodynamic and Metabolic Studies of a Case of Toxemia of Pregnancy*, 127 AM. J. OBSTET GYNECOL. 206 (1977).
72. *Supra* n.31.
73. *Supra* n.65.
74. *Supra* n.69.
75. *Supra* n.70.
76. *Supra* n.64.
77. Tunick, *An Internist Looks at Varicose Veins*, 11 CONTEMPORARY SURGERY 112 (1977).
78. *Supra* n.77.
79. Cranley, *Managing Varicose Veins in Pregnancy*, 7 CONTEMPORARY OB/GYN 143 (1976).
80. Rothfield and Chao, *The Effects of SLE on Pregnancy*, 10 CONTEMPORARY OB/GYN 64 (1977).
81. R. Messer, *Medical Indications For Pregnancy Interruption*, PREGNANCY TERMINATION 309 (1st 1979).
82. Levine and Colea, *When Pregnancy Complicates Chronic Granulocytic Leukemia*, 13 CONTEMPORARY OB/GYN 49 (1979).
83. Sheehy, *An Evaluation of the Effect of Pregnancy on Chronic Granulocytic Leukemia*, 75 AM J. OBSTET. GYNECOL. 789 (1958).
84. *Supra* n.28 at 962.
85. Flesa, *et al.*, *Thromboembolic Disorders in Pregnancy: Pathophysiology Diagnosis and Treatment with Emphasis on Heparin*, 17 CLINICAL OBSTETRICS AND GYNECOLOGY 215-216 (1974).

86. Gallus, et al., *Prevention of Venous Thrombosis with Small Subcutaneous Doses of Heparin*, 235 JAMA 1980 (1976).
87. Baskin et al., *Low-Dose Heparin for Prevention of Thromboembolic Disease in Pregnancy*, 129 AM. J. OBSTET. GYNECOL. 590 (1977).
88. Gabbe, *New Ideas on Managing the Pregnant Diabetic Patient*, 13 CONTEMPORARY OB/GYN 109 (1979).
89. *Supra* n.31 at 191.
90. *Supra* n.87.
91. Ismach, *Diabetes in Pregnancy: New Group Discusses Management Problems*, 11 CONTEMPORARY OB/GYN 31 (1978).
92. Duhring, *Diabetes in Pregnancy: How to Diagnose and Treat It*, 9 CONTEMPORARY OB/GYN 117 (1977).
93. Coustan and Lewis, *Clinical Approaches to Diabetes in Pregnancy*, 7 CONTEMPORARY OB/GYN 27 (1976).
94. Linzey, *Controlling Diabetes with Continuous Insulin Infusion*, 12 CONTEMPORARY OB/GYN 43 (1978).
95. *Supra*. n.87.
96. Lindheimer and Davison, *Renal Disease in Pregnant Women*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 420 (1978).
97. Sims, *Serial Studies of Renal Function in Pregnancy Complicated by Diabetes Mellitus*, 10 DIABETES 190 (1961).

IN THE
SUPREME COURT OF THE UNITED STATES

Nos. 79-4, 79-5, and 79-491

October Term 1979

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MICHAEL RODAK, JR., CLERK

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
Appellants

v.

DAVID ZBARAZ, ET AL.,
Appellees

JEFFREY C. MILLER,
Acting Director, Illinois Department of
Public Aid,
Appellant

v.

DAVID ZBARAZ, ET. AL.,
Appellees

THE UNITED STATES OF AMERICA,
Appellant

v.

DAVID ZBARAZ, ET. AL.,
Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

AMICUS BRIEF OF THE COMMONWEALTH OF
MASSACHUSETTS AND THE STATES OF MISSOURI,
STATE OF NEBRASKA, AND THE STATE OF OHIO

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TABLE OF CONTENTS

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Interest of Amici	1
Summary of Argument	3
Argument	6
The nature of the problem	6
Title XIX Does Not Require Participatory States To Provide Reimbursement For The Costs Of Any Particular "Medically Necessary" Service	10
Introduction	10
Federal Financial Participation In State Expenditures For Health Services Prior To The Enactment Of Title XIX	14
The Enactment of Title XIX	23
The Use Of The Defined Term "Medical Assistance"	27
Summary	28
Title XIX Contains Explicit Standards For Judging The Conformity Of A State Plan With Federal Requirements, And These Standards Do Not Require State Plans To Include Provisions Authorizing The Reimbursement Of Costs Related To The Provision Of "Medically Necessary" Abortion Services	30
Conclusion	56

TABLE OF AUTHORITIES

Cases

<u>Beal v. Doe</u> , 432 U.S. 438 (1977)	3, 5, 7
<u>Bourgeois v. Stevens</u> , 532 F.2d 799 (1st Cir. 1976)	46
<u>Burns v. Alcala</u> , 420 U.S. 575 (1975)	6
<u>Preterm, Inc. v. Dukakis</u> , 591 F.2d 121 (1st Cir. 1979)	8, 9, 27, 47, 51
<u>Quern v. Mandley</u> , 436 U.S. 725 (1978)	49, 50
<u>Rosado v. Wyman</u> , 397 U.S. 397 (1970)	46
<u>Woodruff v. Lavine</u> , 417 F.supp. 824 (S.D.N.Y. 1976)	30
<u>Zbarz v. Quern</u> , 596 F.2d 196 (1979)	3, 8, 47, 51

Statutes

Social Security Act of 1935, as amended

§ 1901	11, 26
§ 1902	passim
§ 1903	13, 14
§ 1904	13
§ 1905	11, 13, 14
§ 2001	13
42 U.S.C. §1320c-4 (1976)	27
42 U.S.C. §1396 (1976)	10
42 U.S.C. §1396a	10
42 U.S.C. §1396b	10
42 U.S.C. §1396c	10
42 U.S.C. §1396d	11, 28
87 Stat. 970	13
79 Stat. 286	23
74 Stat. 924	
49 Stat. 621	15

Regulations

42 C.F.R. § 449.10(a)(5)(i) (1979)	51
42 C.F.R. § 440.230 (1978)	51-54
43 F.R. 57 253 (Dec. 7, 1978)	51

Miscellaneous

Conference Report No. 2165, 86 Cong., 2nd Sess. (1960)	22
Note, Welfare's "Condition X," 76 Yale L.J. 12222 (1967)	
Senate Report No. 2133, 84 Congl, 2nd Sess. (1956)	16
Senate Report No. 1856, 86 Cong., 2nd Sess. (1960)	19
Senate Report No. 404, 89 Cong., 1st Sess. (1965)	25, 26, 33, 46, 49
L. Sullivan, The Tall Office Building Artistically Considered, Lippencott's Magazine (march, 1896)	28

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MASSACHUSETTS AND THE STATES OF MISSOURI,
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INTEREST OF THE AMICI

The Commonwealth of Massachusetts and the States

of Missouri, Nebraska, and Ohio (the amici states) file this amicus brief in support of the appeals of the State of Illinois, et al., from the judgments of the Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois. The amici states seek to express their concern that the Court not permit the structure and operation of the state-federal Medicaid program, in which they participate along with Illinois, to be drastically altered by judicial decision unsupported by statutory requirement. In particular, they seek to demonstrate that the decision of the Court of Appeals holding Illinois' state plan for medical assistance to be in conflict with the provisions of title XIX of the Social Security Act disregards established approaches to statutory interpretation and would, if accepted, impose unanticipated burdens and restrictions upon the states. As those who must bear these burdens and adjust to these restrictions, the amici states are perhaps uniquely qualified to convey these concerns to the Court.

SUMMARY OF ARGUMENT

In the first portion of their argument, the amici states place the decision of the Court of Appeals for the Seventh Circuit on the statutory issues in this case, reported as Zbaraz v. Quern at 596 F.2d 196 (7th Cir. 1979), in the context of the litigation under title XIX which has followed this Court's decision in Beal v. Doe, 432 U.S. 438 (1977). The amici states point out that, although the Court of Appeals correctly decided that title XIX does not require participating states to provide reimbursement for costs related to the provision of so-called "medically necessary" health care services, including abortion services, the court erroneously concluded that Illinois' plan for medical assistance, despite the effect of the so-called Hyde Amendment,^{1/} does not conform to the requirements of title XIX.

^{1/} The amici states limit their argument in this brief to the statutory issues this case involves, in particular to the question of title XIX's proper interpretation. They do not consider the effect of the Hyde Amendment, for, in their view, there is no need to do so once title XIX's requirements are properly understood.

The Hyde Amendment applicable to the proceedings in the Court of Appeals is a limitation on appropriations for the Department of Health, Education, and Welfare and provides in pertinent part that:

(footnote continued)

The amici states dedicate the second portion of their argument to a review of title XIX's controversial "necessary medical services" language. The meaning of this phrase is critical to the reasoning of the Court of Appeals in this case, reasoning which the appellees may well challenge in this Court. What Congress meant by the phrase is also generally misunderstood. To demonstrate the fundamental nature of this misunderstanding and provide the Court with a basis for affirming the "medically necessary" aspect of the decision of the Court of Appeals, the amici states present a careful analysis of title XIX's legislative history. This analysis demonstrates that Congress did not use the phrase "necessary medical services" as a substitute for the term "medically

(footnote continued)

provided, That none of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Zoaraz v. Quern, 596 F.2d at 199.

necessary" services and that the Court of Appeals correctly concluded that title XIX does not require the states to reimburse health care providers for costs related to the provision of "medically necessary" health care services.

Finally, the amici states conclude their argument with a review of title XIX's conformity criteria, including those provisions upon which the Court of Appeals relied to hold Illinois' state plan inconsistent with the statute. The amici states once again emphasize the importance of careful statutory analysis to the preservation of the complicated structure of federal-state relations which provides the foundation for the Act's various public assistance programs.

ARGUMENT

I. The Nature Of The Problem

Must a state provide reimbursement for the costs of a particular "medically necessary" health care service under its Medicaid program? If not, is it yet "unreasonable and wholly inconsistent with the purposes of title XIX" for a state not to do so? These two questions embody the essence of a number of cases pending in various postures in lower federal courts throughout the country. In large part, these cases are the successors to Beal v. Doe, 432 U.S. 438 (1977), in which this court held that title XIX of the Social Security Act does not impose upon states which choose to participate in the cooperative federal-state program of medical assistance which it authorizes an obligation to reimburse health care providers for the costs of "elective" health care services not included in a state's approved plan for medical assistance. In reaching this conclusion, the Court, as it had in earlier A.F.D.C. cases, ^{2/} stressed that the question involved was one of statutory interpretation and set forth an analytical model which, one might have supposed, lower courts would recognize as the one to use when called upon to resolve similar controversies. Unfortunately, with a few encouraging

^{2/} E.g., Burns v. Alcala, 420 U.S. 575 (1975).

exceptions, the lower federal courts have failed to adopt this Court's approach to the interpretation of title XIX's provisions and, instead, reached decisions imposing requirements upon the states which lack support in the statute's provisions and any resemblance to the analytical methodology used in Beal.^{3/} These cases, often, as in this one, involving state limitations on the reimbursement of costs related to the provision of so-called "medically necessary" abortion services, pose significant problems for participating states because the breadth of the principles involved threaten to constrict significantly the states' traditional ability to determine the type

^{3/} While Beal's status as a model of analysis is well-deserved, it does contain an unfortunate element of commentary which is largely responsible for the present controversy over "medically necessary" services. The troublesome dictum appears near the end of the Court's analysis of the statutory issue: "Although serious statutory questions might be presented if a state medicaid plan excluded medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary—though perhaps desirable—medical services. . . [emphasis supplied and in the original]." 432 U.S. at 444-45.

This dictum has led many lower courts to assume an admittedly serious question has an even more serious answer, i.e., that title XIX does require states to pay for "medically necessary" services. A major portion of the argument contained in this brief is devoted to demonstrating the opposite. See pp. 10-30, below.

and amount of benefits coverage available under their individual plans for medical assistance.

In this brief the amici states seek to persuade the Court that: (1) the Court of Appeals for the Seventh Circuit in this case properly followed the decision of the Court of Appeals for the First Circuit in Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979) and determined that title XIX of the Social Security Act (Act) does not require states participating in the Medicaid program to provide reimbursement to health care providers for costs related to the provision of any particular "medically necessary" health care service, including abortion services; and (2) that both the Court of Appeals for the Seventh Circuit in this case and the Court of Appeals for the First Circuit in Preterm v. Dukakis, supra, incorrectly concluded that a state's failure to include a provision authorizing the reimbursement of costs related to the provision of "medically necessary" abortion services in its state plan for medical assistance "violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion. . . .," Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979), citing Preterm v. Dukakis, supra. The approach to this task which the amici states have chosen is to begin with a detailed review of title XIX's legislative history, particularly that associated with the use of the phrase "necessary medical

service." This review demonstrates that the Court of Appeals properly held that title XIX does not require Illinois to provide reimbursement for costs related to the provision of "medically necessary" abortion services. The amici states conclude their argument by demonstrating that state plans for medical assistance such as those of Illinois and the amici states which place various restrictions on the reimbursement of costs related to the provision of "medically necessary" abortion and other services are not "'unreasonable'" and wholly "[in]consistent with the objectives of the Act. . . .," Preterm v. Dukakis, 591 F.2d at 126, but rather conform to the requirements of title XIX.

II. Title XIX Does Not Require Participating States To Provide Reimbursement For The Costs of Any Particular "Medically Necessary" Service.

A. Introduction

Proper interpretation of the Social Security Act depends upon careful observation of its architecture. Although Congress has amended the statute often and substantially since its passage in 1935, its basic structure has exhibited remarkable endurance. Title XIX of the Act (Medicaid), codified as Chapter XII, subchapter XIX, §§ 1396a-1396k of the United States Code, follows closely the now classic style of the Act's draftsmen: Section 1901 (codified as 42 U.S.C. § 1396 (1976)) constitutes an appropriations authorization and embodies a subsidiary statement of purpose; section 1902 (codified as 42 U.S.C. § 1396a (1976)) establishes state plan requirements and directs the Secretary of Health, Education, and Welfare to approve plans which meet these requirements; section 1903 (codified as 42 U.S.C. § 1396b (1976)) requires the Secretary to reimburse states for certain portions of their expenditures "as medical assistance"; section 1904 (codified as 42 U.S.C. § 1396c (1976)) authorizes the Secretary of HEW to suspend payments after notice and hearing (the so-called "conformity hearing") upon a

determination that a state has affected unlawful modifications in its state plan or has failed to administer it in substantial compliance with the state plan requirements contained in § 1902; section 1905 (codified as 42 U.S.C. § 1396d (1976)) provides definitions of selected terms, including and of particular importance for present purposes, "medical assistance"; and the remaining sections deal with miscellaneous matters, including criminal penalties for fraudulent claims, the certification of skilled nursing home facilities, and similar specific aspects of the Medicaid program.^{4/}

Section 1901 provides, as it did when originally enacted in 1965 that:

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of

^{4/} A common short-hand way of referring to the major or original sections of the Act when one is concerned with their function regardless of the programmatic title in which they appear is by their last two digits (the first digit merely identifies the title). Thus, whatever the title, §§ 102, 402, etc. (the state plan requirements sections) are referred to as the "02" sections, §§ 103, 403, etc. (the payments to the state sections) as the "03" sections; and §§ 104, 404, etc. (the conformity hearing sections) as the "04" sections. The amici states also use this method of reference occasionally in this portion of their brief.

families with dependent children and of aged, blind, or disabled^{5/} individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

Four features of this section merit close attention. First, it is primarily an appropriations authorization and subsidiary statement of purpose section. Second, the section in terms imposes no substantive requirements upon the states. Rather, in its only sentence which can fairly be considered prescriptive, it simply restricts the use of the funds it authorizes to be appropriated each

^{5/} 87 Stat. 960 substituted the term "disabled" for the phrase "permanently and totally disabled."

fiscal year to the making of payments to those states which have submitted "plans for medical assistance" to the Secretary of HEW and obtained the requisite approval of them. Third, as do the cognate sections of its predecessors and successors,^{6/} the section begins with a statement of purpose which announces Congress's intention as being to "[enable] each State, as far as practicable under the conditions in such State, to furnish. . . [emphasis supplied]" a certain type of public assistance ("medical assistance") to certain persons. Recognition of the financial limitations of state governments is clearly this language's purpose. Fourth and perhaps most importantly, the section never uses the phrase "medically necessary." Congress's omission of any reference to this concept in the design and construction of this section is, as the amici states argue later, quite intentional, and judicial attempts to conflate the phrase "necessary medical services" with the term "medically necessary" not only lack textual support but also do violence to the statute's architecture.

Section 1901 has two—and only two—functions to perform as a component of title XIX, and Congress designed it to perform these functions in concert with three other sections: 1902, 1903, and 1905. The first

^{6/} E.g., titles I and XX.

function is to operate as a standing authorization for appropriations. It performs this function in conjunction with § 1903 which requires the Secretary to pay each state with an approved plan from appropriated funds "an amount equal to the Federal medical assistance percentage (as defined in section 1905(b), subject to subsections (g), (e), and (h) of this section) of the total amount expended during such quarter as medical assistance under the State plan. . . ."

The second function is to limit the use of appropriated funds to the reimbursement of only those state expenditures incurred as "medical assistance provided to eligible persons." Since "medical assistance" is a defined term, see § 1905(a), analysis of the relationship between the "01" section and its mention of "necessary medical services" and the definition contained in the "05" section requires a somewhat lengthy digression.

B. Federal Financial Participation In State Expenditures For Health Services Prior To The Enactment Of Title XIX

Title XIX, enacted in 1965, created a separate system for providing medical assistance benefits to persons who previously received such benefits as a function of their eligibility for the more traditional form of public assistance: cash grants. For example, under title I

(originally Old-Age Assistance (OAA)), federal financial participation was available to states in "an amount, which shall be used exclusively as old-age assistance, equal to one-half of the total of sums expended. . . as old-age assistance under the State plan. . . ," 49 Stat. 621, § 3(a). This traditional cash grant form of public assistance was expanded in 1956 to include "medical assistance" and a medical "vendor payments" program. Although states had previously been able to assist OAA recipients in meeting medical expenses and obtain federal financial participation in the expenditures they incurred, they had been limited to providing this assistance as part of the monthly OAA cash grant, and rather low limits were placed on the maximum amount of a cash grant. As the Senate Finance Committee noted:

The bill would provide Federal matching of expenditures for payments to suppliers [vendors] of medical care separate from money payments to assistance recipients and would use an average basis for determining Federal participation in payment to suppliers of medical care This assurance of Federal participation on an average basis should stimulate States to secure necessary care for recipients, particularly in States with relatively

limited resources Under the bill all payments to suppliers of medical care would be matched under the separate provision. States would still be able if they chose to do so to include in money payments to recipients amounts to meet medical needs within the maximums on money payments specified in titles I, IV, X, and XIV . . . [emphasis supplied].

Sen. Rept. No. 2133, 84th Cong., 2nd Sess., July 26, 1956, reprinted in 3 U.S. Code Cong. & Admin. News 3877, 3905-06 (1956).

Two specific points are worth making at this juncture. First, the Congress, as it usually does when it improves the Social Security Act, expressed its intention in terms of "stimulating"—not requiring—the states to increase their expenditures for public assistance and recognized that, given the fiscal limitations of state governments, the most effective form of stimulation is increased federal financial participation. Second, this is the first time that the word "necessary" appears, as far as the amici states are aware, in conjunction with a discussion of medical care benefits. Significantly, the word does not appear in the 1956 amendments themselves.

Moving forward in time, one learns that the Social Security Amendments of 1960 worked the penultimate

significant change in Congress's approach to authorizing federal financial participation in state expenditures for medical care under the Act's public assistance programs. Often referred to in part as the Kerr-Mills Act, portions of the 1960 Amendments were the predecessor of title XVIII (Medicare) and, as events unfolded, title XIX as well. Noting that "[t]he major issue presented to the [Senate Finance Committee] this year has been the increasing cost of adequate medical care for older people . . .," the Senate Finance Committee proposed substantial changes in the House bill, H.R. 12580. For present purposes, the most significant change was to provide for the amendment of title I to include "medical services for the aged," and the most illuminating aspect of these amendments is the legislative history associated with the introduction of the phrase "necessary medical services." As a review of this material demonstrates, the lower federal courts have erred in reasoning that Congress used the phrase "necessary medical services" as an equivalent for the term "medically necessary" in title XIX. To the contrary, when it used the phrase "necessary medical services" for the first time in 1960, Congress had a completely different concept and purpose in mind.

The Senate Finance Committee's report accompanying the 1960 Amendments and referring specifically to the Kerr-Mills Act amendments to title I

of the Act begins its analysis with the following instructive paragraph:

Your committee has designed a Federal-State matching program based upon historic principles of Federal-State cooperation. This program is established under title I of the Social Security Act, thereby providing additional matching funds to the States to (1) establish a new or improve their existing medical care program for those on the old-age assistance roles, and (2) add a new program designated to furnish medical assistance to those needy elderly citizens who are not eligible for old-age assistance but who are financially unable to pay for the medical and hospital care needed to preserve their health and prolong their life. The twofold plan would thus cover all medically needy aged 65 or over, whether or not they are eligible for old-age assistance, or whether or not they are eligible for the benefits under the social security or any other retirement program. It accomplishes this objective within the framework of a Federal-State program with broad discrimination allowed to the States as to the programs they will institute, improve, and administer

in meeting the health needs of the aged when illness occurs or continues [emphasis supplied].^{7/}

Sen. Rept. No. 1856, 86th Cong., 2nd Sess. (1960), reprinted in 2 U.S. Code Cong. & Admin. News 3608, 3610 (1960).

The report continues with a description of title I's

^{7/} The report contains a further and more explicit statement of purpose which is also worth reading:

1. Purpose

The existing provisions of title I provide Federal funds to the States for medical services to aged individuals who are determined to be needy by the States. At the present time, States provide needy aged person with "money payments" for medical services and also provide "vendor payments" to the suppliers of medical care These provisions vary greatly. Some States have relatively adequate provisions for the medical care of needy persons; others have little or no provision. The increased Federal financial provisions in the bill are designed to encourage the States to extend comprehensive medical services to all needy persons receiving monthly assistance payments. Participation in the Federal-State program is completely optional with the States, with each State determining the extent and character of its own program, including the standards of eligibility and the nature and scope of benefits. The limits of Federal financial participation are discussed later in this report [emphasis supplied].

operation prior to amendment and the changes which the Committee intended to make in it. Although too lengthy to reproduce in their entirety here, certain sections deserve explicit mention. The report makes clear that Congress's intention was to "encourage," not require, the states to enlarge their expenditures for medical care services provided to persons receiving OAA or who, while able to meet the day to day expenses of life, are unable to incur substantial expenditures for medical services (the "medically needy"). While the Congressional goal was to encourage the development of "comprehensive medical care program[s]" for OAA recipients, the Senate Finance Committee deliberately wrote that, as to the scope of medical services the states might provide and still secure federal financial participation in their OAA expenditures, "[t]here is no Federal limitation on medical services provided under the bill. Each State may determine for itself the scope of medical services to be provided in its program." Similarly, as to the "medically needy" and the new Medical Assistance for the Aged (MAA) program, the Committee emphasized the incentive nature of its proposal and its intention that the states:

have broad latitude in determining eligibility for benefits under the program as well as the scope and nature of the services to be provided within the limitations prescribed. Thus, each State

would determine the tests for eligibility and the medical services to be provided under the State program within the limitations described below. Federal financial participation would be governed by the establishment of an approved plan subject to the criteria and limitations prescribed in the law [emphasis supplied].

The limitations upon federal financial participation to which the Committee referred are listed in the immediately following section of the report which deals with eligibility:

2. Eligibility

Benefits under a State program may be provided only for persons 65 years of age or over to the extent they are unable to pay the cost of their medical expenses . . . [emphasis supplied].

And then the Committee indicated exactly how it proposed to amend title I to accomplish its goals:

Section 1 of the Social Security Act, as it would be amended by the bill, provides that one of the objectives of the title is to furnish medical assistance to individuals who are not recipients of old-age assistance but whose income and resources are insufficient to meet

the costs of necessary medical services. . . [emphasis supplied].^{8/}

Here, then, are the roots of the phrase "necessary medical services" which some lower federal courts equate with the term "medically necessary." These roots rest not in the "02" plan requirements section of title I, but rather in the "01" authorization section. They are nurtured not by a Congressional intention to require the States to provide any medical services at all, "medically necessary" or otherwise, but rather by a desire to limit the availability of MAA program benefits to those medically needy aged persons "whose income and resources are insufficient to meet the cost of necessary medical services [emphasis supplied]." Unless the Congress substantially altered its intentions between 1960 and 1965 concerning the federal-state public assistance programs and their medical services components which it created under the Act, the amici states submit that it should be clear that the phrase "necessary medical services," and the legal purpose it was intended to serve, are not equivalent—indeed, have nothing in common with—the term "medically necessary." The following discussion

^{8/} The Conference Committee adopted the Senate Finance Committee's approach and its choice of the phrase "necessary medical services." Conf. Rept. No. 2165, 86th Cong., 2nd Sess. (1960), reprinted in 2 U.S. Code Cong. & Admin. News 3749, 3756 (1960).

both brings this digression to a conclusion and demonstrates that the Congress made no such change in its intentions when it enacted title XIX.

C. The Enactment of Title XIX

Title XIX was enacted as a component of the Social Security Amendments of 1965, 79 Stat. 286. Title XVIII, which created the Medicare program, was the major provision of this set of amendments to the Act, and the controversial nature of this initial national foray into health insurance overshadowed the issues involved in the drafting of title XIX. This result is understandable for, as the Congress conceived it, title XIX was simply a consolidation and improvement of the existing medical assistance programs already authorized under the Act's various categorical assistance titles. The Senate Finance Committee's report makes this point clear:

6. BACKGROUND AND EXTENSION OF KERR-MILLS MEDICAL ASSISTANCE PROGRAM

(a) Background

The provision of medical care for the needy has long been a responsibility of the State and local public welfare agencies. In recent years, the Federal Government has assisted the States and localities in carrying this responsibility by participating in the cost of the care provided.

Under the original Social Security Act, it was possible for the States, with Federal help, to furnish money to the needy with which they could buy the medical care they needed. Since 1950, the Social Security Act has authorized participation in the cost of medical care provided in behalf of needy aged, blind, disabled, and dependent children—the so-called vendor payments.

Several times since 1950, the Congress has liberalized the provisions of law under which the States administer the State-Federal program of medical assistance for the needy. The most significant enactment was in 1960 when the Kerr-Mills medical assistance for the aged program was authorized. This legislation offers generous Federal matching to enable the States to provide medical care in behalf of aged persons who have enough income for their basic maintenance but not enough for medical care costs [i.e., "necessary medical services"]

The committee bill is designed to liberalize the Federal law under which States operate their medical assistance programs so as to make medical services for the needy more generally available. To accomplish this objective, the

committee bill would establish, effective January 1, 1966, a new title in the Social Security Act—"Title XIX: Grants to the States for Medical Assistance Programs."

Sen. Rept. No. 404, 89th Cong., 1st Sess. (1965), reprinted in 1 U.S. Code Cong. & Admin. News 1943, 2014.^{9/}

The Senate report then goes on at some length and in fair detail to describe the general nature of its proposals for title XIX and, in a section by section analysis, the effect of the proposal's specific provisions. See Sen. Rept. 404, 89th Cong., 1st Sess. (1965), reprinted in U.S. Code Cong. & Admin. News, 2015-52 (1965). Three observations are worth making concerning the report's contents. First, it specifically discusses suggested state plan requirements for inclusion in the "02" section of the new title. Second, neither in its discussion of plan requirements nor anywhere else does the report mention the term

^{9/} The introductory summary of the proposed title XIX put the matter even more simply:

In order to provide a more effective Kerr-Mills medical assistance program for the aged and to extend its provisions to additional needy persons, the bill would establish a single and separate medical care program to consolidate and expand the differing provisions for the needy which currently are found in five titles of the Social Security Act.

"medically necessary" or suggest that the Senate Finance Committee intended to require the States to provide any specific type of medical services. Rather, as stated in the paragraphs dealing with eligibility and in reference to the "02" section requirements, the committee spoke only in terms of requiring states to include in their state plans "provision for medical assistance [to the categorically eligible and, if desired, the "medically needy"]," id. at 2017; see also 2144-45. Third, §1901 was taken, with appropriate adjustments to make its provisions applicable to all of the Act's categorical assistance titles, from §101, as amended by the Kerr-Mills Act in 1960. See id. at 2144.

And so, there it is. The relationship between "necessary medical services" and the defined term "medical assistance," the relationship which prompted this extended digression, now appears to be a straight-forward one. "Necessary medical services" is the phrase, inherited from Kerr-Mills, which the Congress used first in Kerr-Mills and then in title XIX both to (1) expand the availability of federal financial participation beyond the categorically needy to the medically needy and (2) limit the federal obligation to participate in state expenditures to those incurred as "medical assistance" on behalf of persons "whose income and resources are insufficient to meet the costs of necessary medical services. . . [emphasis supplied]." "Medical assistance," defined as usual in the "05" section of the new title, imposes

the substantive requirement through its use, as usual, in the "02" section. Neither phrase has anything to do with the concept to which the term "medically necessary" refers.^{10/}

D. The Use of the Defined Term
"Medical Assistance"

Observation of title XIX's architecture reasonably concludes with a moment's look at the detailing associated with the placement and use of the defined

^{10/} The Court should understand that the concept to which the term "medically necessary" refers is intrinsically judgmental. It amounts, in effect, to the clinical judgment of a physician that a certain course of treatment is required. Obviously, such judgments vary widely. See Preterm v. Dukakis, 591 F.2d at 125. To be sure, the Congress has established special entities under title XI of the Act, i.e., Professional Standards Review Organizations or PSROs, to review the appropriateness of health care services provided to Medicaid recipients by participating providers. These entities are empowered to disallow provider claims for reimbursement under a state Medicaid program only if they determine that the health care services provided were unnecessary or otherwise inappropriate. 42 U.S.C. §1320c-4 (1976). However, there is no question that many types of health care services may pass scrutiny under the "medically necessary" test within the meaning of title XI's PSRO provisions but nevertheless lawfully be subject to exclusion by a state from its state plan for medical assistance for fiscal or other permissible reasons. In short, the Act's PSRO provisions are designed to protect the federal and state treasuries and not to force the expenditure of state funds.

term "medical assistance." As it appears in the "05" section, the definition of "medical assistance" contains no mention of "medically necessary" health care services. Indeed, it mentions no specific type of health care service or characteristic of a health care service. Rather, it refers to broad classes or categories of health care and services and defines "medical assistance" to mean "payment of all or part of the cost of the following care or services . . . [emphasis supplied]." 42 U.S.C. §1396d(a) (1976). This choice of form, as with most architecture, is based upon a clear perception of function:^{11/} to describe the type of state expenditure in which the federal government would be willing to participate while leaving to the states broad discretion to determine the exact nature of the benefits to provide eligible recipients.

E. Summary

Title XIX's structural lines have not changed significantly since Congress shaped them in 1965. While both Congress and the Department of Health, Education, and Welfare have made substantial additions to the basic structure over the past fifteen years, most noticeably in

^{11/} See generally L. Sullivan, *The Tall Office Building Artistically Considered*, Lippencott's Magazine (March, 1896) (containing the statement thought to guide modern architecture that "Form ever follows function").

the areas of cost control and facility and service standards, the amici states have found no indication of an intention to alter the title's fundamental design principles, principles which rest upon the foundation which the Congress erected in 1935: (1) a federal-state cooperative system of financial participation in state expenditures for public assistance which (2) recognizes the historic and primary role of the states in the social welfare area and (3) seeks to stimulate and encourage the improvement of state welfare programs by making federal financial participation available to states which (4) submit plans for public assistance programs to the Secretary of HEW which satisfy the Act's requirements. A well-designed statutory scheme such as this cannot reasonably be thought to have omitted from careful and explicit statment such an essential requirement as some lower federal courts in cases similar to this have added to it. Rather, as the argument in the following section demonstrates, the Court should judge the conformity of Illinois' state plan for medical assistance on the basis of title XIX's explicit standards, standards which include neither a requirement that states reimburse health care providers for costs related to the provision of "medically necessary" abortion services nor provisions which render non-conforming as "unreasonable" or "inconsistent" a state plan which excludes such services.

III. Title XIX Contains Explicit Standards For Judging The Conformity Of A State Plan With Federal Requirements, And These Standards Do Not Require State Plans To Include Provisions Authorizing The Reimbursement Of Costs Related To The Provision Of "Medically Necessary" Abortion Services.

Title XIX in its "04" section provides as usual that, if the Secretary of HEW determines after a conformity hearing that a previously approved state plan no longer complies with the requirements of the "02" section or is being administered in a manner which does not "comply substantially" with "02" requirements, she shall stop making payments as federal financial participation to the non-conforming state. The "04" section thus makes clear Congress's intention that federal funds appropriated under title XIX not be available as federal financial participation to states whose "plan[s] for medical assistance," although once properly approved, are altered or administered in a manner such that the programs they authorize no longer "comply substantially" with the provisions of §1902. See Woodruff v. Lavine, 417 F. Supp. 824 (S.D.N.Y. 1976) (standard of judicial review of state compliance with Early and Periodic Screening, Diagnosis, and Treatment program component of the Medicaid

program is "substantial compliance").^{12/} Therefore, the focus of a conformity examination, whether before HEW or, as here, in the federal courts, must be on the requirements of the "02" section.^{13/} A concurrent look at title XIX's "02" section and several leading cases should establish that, while §1902 includes many conformity criteria, the restrictions which the Court of Appeals imposed in this case (amounting to a determination that, despite the effect of the Hyde Amendment, Illinois must include a plan provision authorizing payment for all "medically necessary" abortions, Quern v. Zbaraz, 596 F.2d at 199, are not among them.

The traditional opening sub-section of an "02"

^{12/} In Rosado v. Wyman, 397 U.S. 397 (1970), this Court held that the availability of an administrative procedure under the "04" sections of the Act does not bar a federal district court from reviewing a claim of non-conformity brought by a person eligible for assistance under the Act. Id. at 406.

^{13/} Over the years, the Congress has taken a somewhat eclectic attitude toward the design of additions to the Act, and one occasionally finds requirements imposed upon the states in sections other than "02". However, with the exception of the "necessary medical services" language contained in title XIX's "01" section, the Court of Appeals did not conclude that a section other than "02" (and its regulations) is involved in this case.

provision in the Social Security Act begins with the statement that "A State plan for the [the appropriate type of public assistance] must— . . . ," and title XIX's "02" section, §1902, follows this tradition. Beginning with the established introduction, §1902(a) goes on to impose a set of requirements which the amici states readily concede participating states must satisfy if they are to obtain federal financial participation in their expenditures as medical assistance.^{14/} Not one of these explicit requirements mentions the term "medically necessary" although many of the forty sub-divisions are extremely precise in their language and deal with quite narrow problems.^{15/} The amici states submit that the proper conclusion on the basis of this observation is that the Court of Appeals erroneously determined that the Congress intended to prohibit Illinois from refusing to provide reimbursement of costs related to the provision of some "medically necessary" abortion services.

To be sure, this conclusion does not mean that states are free to design state plans without regard to any

^{14/} As originally enacted in 1965, this list numbered twenty-two; it now reaches forty, not including two additional and recently added unnumbered paragraphs.

^{15/} E.g., (16), (18), (25), & (32).

minimal federal benefits requirements. To the contrary, the amici states candidly admit that title XIX's "02" section does impose certain and definite standards against which the Secretary of HEW and the federal courts are to judge the adequacy of a state plan's benefits provisions. None of these standards, however, justifies the restrictions which the Court of Appeals would impose on Illinois.

As title XIX's legislative history makes clear, seven of the "02" sections' original requirements are "standard" provisions "which are either identical to the existing provision of law or are merely conforming changes" Sen. Rept. No. 404, 89th Cong., 1st Sess. (1965), reprinted in 1 U.S. Code Cong. & Admin. News 1943, 2014 (1965).^{16/} The Congress added several more provisions to these "standard" provisions "which are either new or changed over provisions currently in the law" *Id.* at 2015.^{17/} Of these provisions, three

^{16/} These requirements appear in the current version of §1902 as sub-divisions (1), (3), (6), (7), (8), (12), and (16).

^{17/} These additions appear in the current version of §1902 as sub-divisions (2), (4), a provision found in other titles of the Act but slightly modified for title XIX's purposes, (5), (9), (10), (11), (13), (14), (15), (17), (18), (19), (20), (21), and (22). Many of these provision, including two of the three most important to the question before the (footnote continued)

provide the criteria against which the conformity of a state plan amendment like that which Illinois adopted should be judged: (10), (13), and (17).

Sub-division (10)^{18/} has three critical functions:

(footnote continued)

Court, i.e., (13) and (17), are based upon similar or identical provisions found in the Act's other categorical assistance titles, particularly title I, as amended in 1960 by the Kerr-Mills Act. This point is discussed in the immediately following text.

^{18/} In its current form, sub-division (10) provides that:

(10) Provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, or with respect to whom supplemental security income benefits are being paid under title XVI;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause (A); and

(footnote continued)

first, to require participating states to provide "medical assistance" to all persons categorically eligible for benefits under the Act's other public assistance titles;

(footnote 18 continued)

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under title XVI, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under title XVI, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs or necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration and scope;

except that (I) the making available of the services described in paragraph (4), (14), or (16) of section 1905(a) to individuals meeting the age requirements prescribed therein shall not, by reason of this paragraph (10), require the making available of any such services of the same amount, duration, and scope, to individuals of any other ages, (II) the making available of supplementary medical

(footnote continued)

second, to permit states to extend medical assistance to the medically agreement entered into under needy; and, third, to prohibit state plans from discriminating in the amount, scope, or duration of medical assistance among categorically eligible individuals or medically needy individuals or between individuals in the categorically eligible class and individuals in the medically needy class.^{19/} As the Court of Appeals implicitly

(footnote 18 continued)

insurance benefits under part B of title XVIII to individuals eligible therefor (either pursuant to an section 1843 or by reason of the payment of premiums under such title by the State agency on behalf of such individuals), or provision for meeting part or all of the cost of deductibles, cost sharing, or similar charges under part B of title XVIII for individuals eligible for benefits under such paragraph, shall not, by reason of this paragraph (10), require the making available of any such benefits, or the making available of services of the same amount, duration, and scope to any other individuals, and (III) the making available of medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in clause (A) to any classification of individuals approved by the Secretary with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment shall not, by reason of this paragraph (10), require the making available of any such assistance, or the making available of such assistance of the same amount, duration, and scope, to any other individuals not described in clause (A). . . .

recognized, sub-division (10) merely contains a rule of consistency or even-handedness designed to prevent certain undesirable patterns of plan administration from developing.^{20/}

Sub-division (13), in its original form, was derived from title I, §2(a)(11), as added by the Kerr-Mills Act,^{21/} and, with respect to the categorically

^{19/} This provision appears to be derived in concept from title I, as amended by the Kerr-Mills Act to include the "medically needy," and HEW's generic anti-discrimination policy, generally referred to as "Regulation X." See generally Note, Welfare's "Condition X," 76 Yale L.J. 1222 (1967). The legislative history is reproduced in 1 U.S. Code Cong. & Admin. News, 1943, 2017.

^{20/} The previous discussion of the derivation of the phrase "necessary medical services" applies to its use in sub-section (10).

^{21/} Amendments to sub-division (13) since 1965 have not altered the provisions important for present purposes. Presently, sub-division (13) provides that:

(13) provide—

(A)(i) for the inclusion of some institutional and some non-institutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(footnote continued)

eligible,^{22/} imposes the following definite requirements upon state plans:

(footnote 21 continued)

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under title, I, X, XIV, or XVI, or part A of title IV, or with respect to whom supplementary security income benefits are being paid under title XVI, for the inclusion of at least the care and services listed in clauses (1) through (5) of section § 1905(a), and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least—

(i) the care and services listed in clauses (1) through (5) of section 1905(a) or

(ii) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan include hospital or skilled nursing facility services, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hospital services from such hospital or skilled nursing facility services from such home, and

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1122, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan,

(footnote continued)

(13) provide—

(A)(i) for the inclusion of some institutional and some non-institutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing

(footnote 21 continued)

except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1861(v) as the reasonable cost of such services for purposes of title XVIII; and

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary; and

(F) for payment of services described in section 1905(a)(2)(B) provided by a rural health clinic under the plan of 100 percent of costs which are reasonable and related to the cost of furnishing such services or based on such other tests of reasonableness, as the Secretary may prescribe in regulations under section 1833(a)(3), or, in the case of services to which those regulations do not apply, on such tests of reasonableness as the Secretary may prescribe in regulations under this subparagraph

facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV, or with respect to whom supplementary security income benefits are being paid under title XVI, for the inclusion of at least the care and services listed in clauses (1) through (5) of section § 1905(a) [the definition of "medical assistance"] . . . [emphasis supplied].

Sub-paragraph (A)(i) uses particularly significant language, taken verbatim from title I as amended by Kerr-Mills, to state the required scope of a state plan: "some institutional and some non-institutional care and services . . . [emphasis supplied]." The statute doesn't say "all," and it certainly doesn't say "medically necessary." The reason that it says neither of these things is that the Congress had no intention of imposing such a requirement. Rather, title XIX was premised on the same basis as the Kerr-Mills Act and all the other of the Act's public assistance titles: state discretion to determine the scope of benefits included within a state plan.

Paragraph (B)'s provisions do not lead to any different conclusion. This paragraph simply follows the Act's

22/ The analysis is similar for the medically needy.

traditional approach of relying upon its "05" definitional section to describe and limit the nature of the public assistance within the title's scope, and the "05" language in title XIX is equally direct in its acknowledgment of the states' prerogative to determine the scope of benefits they will offer under their state plans:

(a) The term "medical assistance" means payment of all or part of the following care and services

(1) inpatient hospital services . . . ;

(2) (A) outpatient hospital services . . . ;

(3) other laboratory and x-ray services . . . ;

(4) (A) skilled nursing facility services . . . ;
[and]

(5) physicians' services, furnished by a physician (as defined in section 1861(r) (1)), whether furnished in the office, in the patient's home, a hospital, a skilled nursing facility, or elsewhere . . . [emphasis supplied].

Two things are clear from this language. First, just as in paragraph (A), states are not required to pay all of the cost of any type of care or service. Second, they are not required to pay the cost of any particular care or service. Rather, one of § 1905(a)'s purposes is satisfied, as far as the categorically eligible are concerned, if a state plan includes provisions which authorize payment of "all or

part" of "some institutional and some non-institutional care and services."^{23/} Since a state plan need not include all "care and services," it clearly does not need to include a specific type of surgical service, e.g., abortion services, whether "medically necessary" or not.

Sub-division (17) is the last source of material plan conformity criteria.^{24/} The sub-division is lengthy, but its material portion can be set forth:

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving [categorical assistance or SSI], based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title . . . [emphasis supplied].

^{23/} The legislative history concerning the definition of "medical assistance" is reproduced in 1 U.S. Code Cong. & Admin. News 1943, 2021 (1965).

^{24/} Some lower federal courts also have thought sub-division (19) important, but its legislative history, discussed below, makes clear that the sub-division's significance lies in other areas.

The essential language of this paragraph, underscored as it is reproduced above, is found in the Kerr-Mills version of title I: "(11)(D) include reasonable standards, consistent with the objectives of this title, for determining eligibility and the extent of such assistance" 74 Stat. 924. Because the Court of Appeals relied so heavily on sub-division (17), the Senate Finance Committee's comments concerning its predecessor in Kerr-Mills deserve extensive quotation:

MEDICAL ASSISTANCE FOR THE AGED RECEIVING OLD-AGE ASSISTANCE

3. Eligibility.

Each State has the responsibility of determining the standard of eligibility for the medical care it provides to aged persons. For aged persons receiving money payments the State must take into consideration any income and resources of the individual.

4. Scope of medical services.

There is no Federal limitation on medical services provided under the bill. Each State may determine for itself the scope of medical services to be provided in its program.

MEDICAL ASSISTANCE FOR THE AGED NOT
RECEIVING OLD-AGE ASSISTANCE
[MEDICALLY NEEDY]

1. Purpose.

* * *

A State would have broad latitude in determining eligibility for benefits under the program as well as the scope and nature of the services to be provided within the limitations described below

2. Eligibility.

* * *

The State has wide latitude to establish the standard of need for medical assistance as long as it is a reasonable standard consistent with the objectives of this title

3. Scope of benefits.

* * *

The scope of medical benefits and services provided will be determined by the States [emphasis supplied].

Sen. Rept. No. 1856, reprinted in 2 U.S. Code Cong. & Admin. News 3610-14 (1960).

The legislative history of this provision as Congress enacted it in title XIX in 1965 also deserves attention:

(d) Determination of need for medical assistance

The committee bill would make more explicit a provision now in the law that in determining eligibility for and the extent of aid under the plan, States must use reasonable standards consistent with the objectives of the titles. Although States may set a limitation on income and resources which individuals may hold and be eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people. Whatever level of financial eligibility the State determines to be that which is applicable to the needy aged, for example, shall be comparable to that which the State sets to determine the eligibility for the needy blind and disabled; and must also have a comparability to the standards used to determine the eligibility of those who are to receive medical assistance as needy children and the parents or other relatives caring for them The bill also contains a provision designed to correct one of the weaknesses identified in the medical assistance for the aged program [title I].

Under the current provisions of Federal law, some States have enacted programs which contain a cutoff point on income which determines the financial eligibility of the individual In order that the States shall be flexible in the consideration of an individual's income, the committee requires that the State's standards for determining eligibility for and the extent of medical assistance shall take into account, except to the extent prescribed by the Secretary, the cost incurred for medical care or any other type of remedial care recognized under State law . . . [emphasis supplied].

Sen Rept. No. 404, reprinted in 1 U.S. Code Cong. & Admin News 1943, 2018-19.

The truly remarkable learning one gains from this review of sub-division (17)'s legislative history is that the Congress intended (17) to deal primarily with issues of eligibility, not benefits, for it recognized that, under the Act, benefits determinations have always been primarily the states' responsibility. See, e.g., Rosado v. Wyman, 397 U.S. 397, 413 (1970); Bourgeois v. Stevens, 532 F.2d 799, 807 (1st Cir. 1976). Therefore, insofar as the Court determines to look to sub-division (17) as a source of conformity criteria, it should do so realizing that the

decision of the Court of Appeals concerns a benefit, not an eligibility, determination regarding a particular type of surgical service and that, as to such determinations, the Congress has expressed its intention quite clearly that "[t]he scope of medical benefits and services provided will be determined by the States" Sen. Rept. No. 1856, reprinted in 2 U.S. Code Cong. & Admin. News 3610-14 (1960) (applicable to Kerr-Mills Act and carried over by implication to title XIX). Thus, this section properly understood is not a basis for holding that Illinois' plan for medical assistance, simply because it excludes from benefits the reimbursement of costs related to the provision of certain "medically necessary" abortion services, " 'violate[s] the purposes of the Act and discriminate[s] in a prescribed fashion' " Zoaraz v. Quern, 596 F.2d at 199, citing Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979).

One last provision of title XIX's "02" section, sub-division (19), requires discussion. This sub-division currently provides that:

(19) provided such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients . . . [emphasis supplied].

Once again, the legislative history of this provision makes the Congressional purpose underlying its enactment clear:

Under provisions of the committee bill, the State plan must include such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and that such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipient. This provision was included in order to provide some assurance that the States will not use unduly complicated methods of determining eligibility which have the effect of delaying in an unwarranted fashion the decision on eligibility for medical assistance or that the States will not administer the provisions for services in a way which adversely affects the availability or the quality of care to be provided. The committee expects that under this provision, the States will be eliminating unrewarding and unproductive policies and methods of investigation and that they will develop such procedures as will assure the most effective working relationships with medical facilities, practitioners, and suppliers of care and services in order to encourage their full cooperation and participation in the provision of services

under the State plan . . . [emphasis supplied].

Sen. Rept. No. 404, reprinted in 1 U.S. Code Cong. & Admin. News 1943, 2016-17 (1965).

One finds no mention of an intention to require the states to provide any type of health service benefit in this discussion. Moreover, it is evident that the nature of the concerns with which the committee was dealing is completely unrelated to the concept of "medically necessary" health care services. This Court's previous chastising of the Seventh Circuit for its quickness to infer requirements under the Act without specific authority in its text or legislative history should preclude an argument that sub-division (19) should be interpreted broadly:

The short answer is that, since § 402(a)(10) on its face applies only to "aid to families with dependent children" and not to the separately designated program of "emergency aid to needy families with children," it cannot be the basis for making § 406(e) eligibility requirements mandatory on the States.

The Court of Appeals recognized that § 402(a)(10) was limited by its language to AFDC, but nevertheless concluded that Congress intended to treat EA "in the same way" because it is "part of the same statutory scheme," and rooted in the "same Congressional concern with the deprivation of children that brought forth

the AFDC program" Mandley I, supra, at 422. But Congress' choice of precise language in this complex statute cannot be glossed over with such generalities

Quern v. Mandley, 436 U.S. 725, 741 (1978).

The state defendants submit that this review of title XIX's "02" requirements demonstrates that the statute includes a large number of explicit conformity criteria against which the Secretary of HEW and the federal courts should judge a state plan for medical assistance. None of these criteria mentions the phrase "medically necessary," and none, including those which the Court of Appeals relied upon, is even suggestive of an intention on the part of the Congress to restrict the states' well-established, traditional discretion to determine the scope of benefits included in their state plans. Indeed, the terms of the individual provisions of §1902, their inter-relationships within the section, and their legislative history establish that the Congress never considered imposing such a burdensome and fundamentally uncertain requirement as the term "medically necessary" denotes. Nor did Congress implicitly, as the Court of Appeals thought, determine to preclude the states from restricting benefits as Illinois has done.

In addition to the statutory provisions of sub-section (17), the Court of Appeals and other lower federal courts

have relied upon a regulation, 42 C.F.R. § 449.10(a)(5)(i) (1977)^{25/} to support the conclusion that a state must provide reimbursement for the costs of "medically necessary" abortion services. E.g., Zbaraz v. Quern, 596 F.2d at 198-99; Preterm v. Dukakis, 591 F.2d 121, 126-27 (1st Cir. 1979). Close analysis of this regulation demonstrates that it also provides no support for the conclusion of the Court of Appeals.

^{25/} The regulation, now rewritten and recodified at 42 C.F.R. § 440.230 (1978) and amended subsequent to recodification, 43 F.R. 57253 (Dec. 7, 1978), provides that:

§ 440.230 Sufficiency of amount, duration, and scope.

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

HEW explained the December amendment as follows:

(footnote continued)

First, the regulation must be read against the background of the statute upon which it is based and the objectives which the Congress meant to achieve through the authorizing legislation. As previously discussed, neither the statute nor its legislative history justifies the conclusion that states are required to incur expenditures as medical assistance for all "medically necessary" health care services. Second, the regulation imposes only three requirements upon participating states: (1) a state plan for medical assistance must "specify the amount and duration of each service" for which the state will incur expenditures as medical assistance; (2) a state plan, if it includes a "service," must include it "in amount, duration

(footnote 25 continued)

SUMMARY: This document corrects 42 C.F.R. 440.230, sufficiency of amount, duration, and scope, by reinserting two phrases omitted from the September 29, 1978, (43 FR 45176) publication of the rewritten and reorganized Medicaid regulations. The omission of these phrases was not intended to be a policy change. However, several commenters expressed concern that these omissions have been construed as a policy change restricting a State's authority to decide what medical assistance will be covered under the State Medicaid plan. In order to avoid further misunderstandings, § 440.230 is being amended as set forth below.

EFFECTIVE DATE: December 8, 1978.

43 F.R. 57253 (Dec. 7, 1978).

and scope [sufficient for it reasonably to] achieve [its] purpose"; and (3) a state "may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition."

The first requirement is merely a formal one designed to prescribe the minimal written content of a state plan. The second requirement imposes what is best considered an anti-waste restriction: if a state chooses to include a "service," it must include it to a sufficient extent to assure that it "reasonably achieve[s]" its purpose. For example, if a state includes benefits for inpatient hospital services related to the treatment of infectious disease, it cannot make these benefits so minimal (say, limited to two days of hospitalization) that few if any patients could be expected to recover from their illness before they would either have to be discharged or begin paying for additional hospital stay days themselves. For obvious reasons, such a benefit would have little value to recipients and might promote highly undesirable provider attitudes, contrary to Congress's explicit desires. ^{26/}

Finally, the third requirement is by its very terms designed solely to prevent states from denying benefits to an individual "recipient"—already otherwise determined

^{26/} See 1 U.S. Code Cong. & Admin. News at 2017 (1965).

to be eligible for medical assistance—because of the recipient's particular medical situation. Thus, a state may not include a provision in its state plan which purports to authorize a social worker to deny benefits to a Medicaid recipient simply because the recipient needs, say, extensive thoracic surgery which would entail a long hospital stay and post-operative recovery in a skilled nursing facility for several months, assuming, of course, that thoracic surgery in general is a "required service" included in the state plan. Simply put, this requirement has no applicability to a state plan provision which removes from the list of "services" a specific type of surgical service, thus precluding providers of health care services from seeking reimbursement from the state for the cost of any (or some) such services which they provide to all Medicaid recipients. Such a future-oriented, across-the-board elimination of a "service" from a state plan for medical assistance is in all respects consistent with Congressional intent. ^{27/}

^{27/} The final paragraph of the regulation should be read as a qualification of the broad prohibition contained in paragraph (c)(1), not as an independent provision. That is, paragraph (c)(2) permits a state to limit benefits to an individual recipient for appropriate reasons, e.g., a determination that further benefits are not "medically necessary." The paragraph does not constitute an exclusive list of appropriate limits; nor does it impose any duty upon participating states.

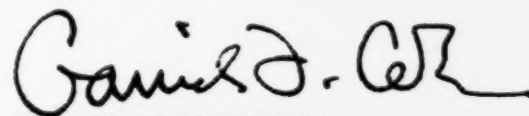
The amici states submit that this review of title XIX's statutory and regulatory requirements should establish as a matter of law that the Illinois' state plan for medical assistance conforms to the requirements of §1902 of the Act, 42 U.S.C. §1396a (1976). The conclusion of the Court of Appeals to the contrary is an unjustifiable one, and this Court should not ratify it.

CONCLUSION

For the reasons set forth above, the Court should determine that Illinois' state plan for medical assistance conforms to the requirements of title XIX of the Social Security Act.

Respectfully submitted,

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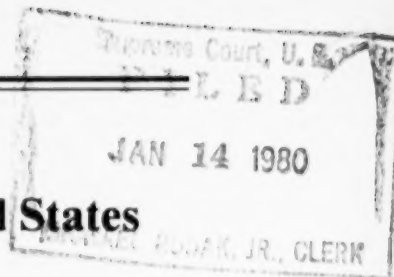
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Dated: January 10, 1980

**In the
Supreme Court of the United States**



OCTOBER TERM, 1979

**JASPER F. WILLIAMS, M.D. AND
EUGENE F. DIAMOND, M.D.,**

Appellants,

and

**ARTHUR F. QUERN, Director
Illinois Department of Public Aid**

Appellant,

and

THE UNITED STATES

Appellant,

vs.

**DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their
own behalf and on behalf of all others similarly situated;
CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois
not-for-profit corporation, and JANE DOE, on her own behalf
and on behalf of all others similarly situated,**

Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

**BRIEF AMICUS CURIAE OF THE
NATIONAL RIGHT TO LIFE COMMITTEE, INC., FOR
APPELLANTS WILLIAMS AND DIAMOND**

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INDEX

	PAGE
Table of Authorities	ii
Note	1
Statement of Interest	1
Brief Amicus Curiae	1a
Note	1a
Summary of Argument	1a
Argument	2
I. The Congressional and Illinois limitations on government funding of abortion for the indigent do not violate the Fourteenth Amendment to the United State Constitution	2
(1) The Woman's Right of Privacy	3
(2) Equal Protection in Abortion Funding	14
(3) The Rational Interests Served by the Abortion Fund- ing Restrictions	15
(a) Childbirth	15
(b) Maternal Health	16
(c) Fiscal Frugality	19
1. The Fiscal Interest Cannot Be Narrowed to a Simple Comparison of the Relative Costs of Abortion and Birth	19
2. It is Reasonable for the State to Conclude That Abortion is Less Expensive Than Childbirth and Thus to Choose to Limit Abortion Fund- ing as a Means of Conserving Its Fiscal Resour- ces	21
(d) Neutrality on Abortion	21
(4) Balancing of Interests	22
(5) The Effect Of The District Court Ruling	24
II. The Illinois Limitation on Abortion Funding under Medi- ciad does not violate Title XIX of the Social Security Act	27
(1) The Medicaid System	27

	PAGE
(2) Broad Discretion in States to Determine Funding	29
(3) States Need Not Fund "Medically Necessary" Abortions	32
(4) The Passage of the Hyde Amendment Further Buttresses the Contention That Title XIX of the Social Security Act Does Not Mandate the Funding of "Medically Necessary" Abortions	33
III. The Appropriations Clause of the United States Constitution Prohibits the Judiciary from Ordering Payments for Abortions Beyond the Limitations Established by Congress	37
Conclusion	44
Appendix	
A Prospective Study of the Effects of Induced Abortion on Subsequent Reproductive Function	App. 1
Quarterly Report Medicaid Financed Abortions	App. 3
Major Reason for Seeking Abortion given by 400 Patients	App. 8

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Arnold v. Sendak</i> , 416 F. Supp. 22 (S.D. Ind. 1976), <i>aff'd.</i> , 429 U.S. 968 (1976)	5
<i>Aware Woman Clinic v. City of Cocoa Beach</i> , No. 77-361-Orl-Civ-Y (M.D. Fla., Memorandum Opinion April 21, 1978)	7
<i>Beal v. Doe</i> , 432 U.S. 438 (1977)	<i>passim</i>
<i>Bellotti v. Baird I</i> , 428 U.S. 132, 145 (1976)	6, 7
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	9, 10
<i>Burns v. Alcala</i> , 420 U.S. 575, 580 (1975)	34
<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715, 723-24 (1961)	22

	PAGE
<i>California State Employees Association v. Flournoy</i> , 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (1973), <i>cert. denied</i> , 414 U.S. 1093 (1974)	40
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	6, 7, 15
<i>Chrisman v. Sisters of St. Joseph</i> , 506 F.2d 308, 311 (9th Cir. 1974)	22
<i>Cincinnati Soap Co. v. United States</i> , 301 U.S. 308 (1937)	40
<i>Coe v. Gerstein</i> , 517 F.2d 787 (5th Cir. 1975), <i>aff'd.</i> , 428 U.S. 901 (1976)	5
<i>Collins v. United States</i> , 15 Ct. Cl. 22 (1879)	40
<i>Committee To Defend Productive Rights v. Myers</i> , No. 1 Civil 45066 (Calif. App., Memorandum Opinion, May 29, 1979) .	13
<i>Connecticut v. Menillo</i> , 423 U.S. 9 (1975)	7, 16
<i>Contracts of Extension Capitol</i> , Op. Atty. Gen. 28 (1853)	40
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	20, 23, 26, 44
<i>Decatur v. Paulding</i> , 39 U.S. 497 (1840)	38
<i>District of Columbia Podiatry Society v. District of Columbia</i> , 407 F. Supp. 1259 (D.D.C. 1975)	30
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	4, 5, 8, 26, 34
<i>Doe v. Matthews</i> , 420 F. Supp. 865 (D.N.J. 1976) ..	39, 40, 42, 43
<i>Doe v. Mundy</i> , 441 F. Supp. 447 (E.D. Wisc. 1971)	12, 26
<i>Doe v. Poelker</i> , 515 F.2d 541, 548 (8th Cir. 1975)	12, 13
<i>Doe v. Rampton</i> , 366 F. Supp. 189 (D. Utah 1973)	5
<i>Doe v. Rose</i> , 497 F.2d 1112 (10th Cir. 1974)	26
<i>Doe v. Zimmerman</i> , 405 F. Supp. 534 (M.D. Penn. 1975)	5
<i>D.R. v. Mitchell</i> , 456 F. Supp. 609 (D.C. Utah 1978)	13, 26, 28, 29, 33
<i>Falkenstein v. Department of Revenue</i> , 350 F. Supp. 887, 889 (D. Ore. 1972), <i>appeal dismissed</i> , 409 U.S. 1099 (1973)	22
<i>Far East Conference v. United States of America</i> , 342 U.S. 570, 574-575 (1952)	14

	PAGE
<i>Freiman v. Walsh</i> , No. 77-4171-CV-C (W.D. Mo., Memorandum Opinion, Jan. 26, 1979)	13
<i>Friendship Medical Center v. Chicago Board of Health</i> , 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975)	5
<i>Geduldig v. Aiello</i> , 417 U.S. 484, 494-98 (1974)	14, 23, 26
<i>Hallmark Clinic v. North Carolina Department of Human Resources</i> , 380 F. Supp. 1153 (E.D.N.C. 1974)	5
<i>Harrington v. Bush</i> , 553 F.2d 190, 214 (D.C. Cir. 1977)	41
<i>Hart's Case</i> , 16 Ct. Cl., 484 (1880), aff'd., 118 U.S. 62 (1888) ..	41
<i>Jefferson v. Hackney</i> , 406 U.S. 535 (1972)	23, 26
<i>Lindsley v. Natural Carbonic Gas Co.</i> , 220 U.S. 61, 78 (1910) ..	44
<i>Maher v. Roe</i> , 432 U.S. 464 (1977)	passim
<i>Mallory v. Barrera</i> , 544 S.W. 2d 556 (Mo. 1976)	40
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	14
<i>McGowan v. Maryland</i> , 366 U.S. 420, 426 (1960)	44
<i>Metropolis Theatre Co. v. City of Chicago</i> , 228 U.S. 61, 69-70 (1912)	44
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	9
<i>Missouri K. & T. R. Co. v. May</i> , 194 U.S. 267, 270 (1904)	20
<i>National Association of Regional Councils v. Costle</i> , 564 F.2d 583, 589 (D.C. Cir. 1977)	42
<i>Opinion of the Justices</i> , 381 A.2d 1204 (N.H. 1978)	40
<i>Paris Adult Theater I v. Slaton</i> , 413 U.S. 49 (1973)	9
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	9
<i>Planned Parenthood of Central Missouri v. Danforth</i> , 428 U.S. 52 (1976)	5, 7, 15, 16
<i>Poelker v. Doe</i> , 432 U.S. 519 (1977)	8, 9, 11, 12, 13, 16, 44
<i>Quern v. Manley</i> , 98 S. Ct. 2068 (1978)	29, 30
<i>Reeside v. Walker</i> , 52 U.S. (11 How) 623 (1850)	40
<i>Reitman v. Mulkey</i> , 387 U.S. 369, 379 (1967)	22
<i>Roe v. Casey</i> , 464 F. Supp. 487 (E.D. Penn. 1978)	26

	PAGE
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	passim
<i>Rosado v. Wyman</i> , 397 U.S. 407 (1970)	14
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1, 30-31 (1973)	9, 14
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	9
<i>Shapp v. Sloan</i> , 367 A.2d 791 (Pa. 1976)	40
<i>Smith v. Ginsberg</i> , No. 75-0380 CH (S.D.W.V., Memorandum Opinion, May 9, 1978)	26
<i>Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corporation</i> , 360 U.S. 411, 420 (1959)	13
<i>Spaulding v. Douglas Aircraft Co., Inc.</i> , 60 F. Supp. 985, 988 (S.D. Calif. 1945)	38, 40, 42
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969)	9
<i>Starkweather v. Blair</i> , 245 Minn. 371, 71 N.W. 2d 869 (1955) ..	40
<i>Stitzel-Weller Distillery v. Wickard</i> , 118 F.2d 19 (1941)	40
<i>Tennessee Valley Authority v. Hill</i> , 98 S. Ct. 2279, 2302 (1978) ..	38
<i>Virginia Hospital Association v. Kenley</i> , 427 F. Supp. 781 (E.D. Va. 1977)	31
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977)	6
<i>Wheeler v. Barrera</i> , 417 U.S. 402 (1974)	40
<i>Williams v. Eaton</i> , 468 F.2d 1079, 1084 (10th Cir. 1972)	22
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483, 488 (1955)	20, 23, 26, 44
<i>Woe v. Califano</i> , 460 F. Supp. 234 (S.D. Ohio 1978)	13, 26
<i>Word v. Poelker</i> , 495 F.2d 1349 (8th Cir. 1974)	4, 5
<i>Wynn v. Scott</i> , 449 F. Supp. 1302 (N.D. Ill. 1978)	5, 6, 16
<i>Zbaraz v. Quern</i> , No. 77C4522 (N.D. Ill., Memorandum Opinion, June 13, 1978)	24
<i>Zbaraz v. Quern</i> , 469 F. Supp. 1212 (N.D. Ill. 1979)	8, 11, 14, 17, 22, 25

	PAGE
<i>Constitutional Provisions</i>	
U.S. Const. art I, §9, cl. 7	37, 39
U.S. Const. amend. XIV	27

<i>Statutes</i>	
Alabama Code Title 46 §270 (Supp. 1963)	34
Col. Rev. Stat. §40-2-23 (1964)	34
New Mexico Stat. Ann. §40A-5-1-3 (1964)	34
Ore. Rev. Stat. §163.060 (1964)	34
42 U.S.C. §1396 (1976)	27, 30, 31
Title IV-A of the Social Security Act	29
Title XIX of the Social Security Act, 42 U.S.C. §1396 <i>et. seq.</i> (1976)	27
42 U.S.C. §1396a(a)(10) (1976)	28, 31
42 U.S.C. §1396a(a)(17) (1976)	27
42 U.S.C. §1396a(a)(19) (1976)	31
42 U.S.C. §1396d(a) (1976)	27
42 U.S.C. §300a7(a)	22
§210 of Pub. L. 95-480, 92 Stat. 1586 (1978)	2
P.A. 80-1091, Ill. Rev. Stat. ch. 23, §5-5 (1977 Supp.)	2
P.A. 80-1091, Ill. Rev. Stat. ch. 23, §6-1 (1977 Supp.)	3
P.A. 80-1091, Ill. Rev. Stat. ch. 23, §7-1 (1977 Supp.)	3

<i>Other Authorities</i>	
45 CFR §449.10(a)(5)(i)	28, 31
Arey, L., <i>Developmental Anatomy</i> , W.B. Saunders Corp., 7th Ed. (1974) p. 55	15
Cates et al, "Standardized Mortality Data Associated with Legal Abortion: United States 1972-1975", 10 Family Plan- ning Perspective 109 (1978)	17
Center for Disease Control, <i>Abortion Surveillance</i> , 1976, 16 (HEW Publication No. (CDC) 78-8205, 1978)	24

	PAGE
Center for Disease Control, "Health Effects of Restricting Federal Funds for Abortion in the United States", 28 Mor- bidity and Mortality Weekly Report 37 (1979)	17
Cong. Rec. H11771 (daily ed. Dec. 11, 1979)	37
Editorial, "A New Ethic for Medicine and Society", 113 Calif. Med. 67 (1970)	15
<i>The Federalist</i> , No. 78 (Wright Ed. 1961) p. 491	41
Gilbert M., <i>Biography of the Unborn</i> , The Williams and Wil- liams Company (1938) p. 2	15
Hardy, "Privacy and Public Funding", 18 Ariz. L.R. 903 (1977)	17, 21, 22
Hausknecht, "Free Standing Abortion Clinics: A New Pheno- menon", 49 Bull. N.Y. Academy of Medicine 985 (1973) ...	25
Hearing before the Subcommittee on Constitutional Admend- ments of the Committee on the Judiciary, United States Senate, Ninety-third Congress, second session on SJ 119 & SJ 130, <i>Abortion — Part 2</i> , p. 52; U.S. Government Print- ing Office, 1976	17
Liley, H.M.I., <i>Modern Motherhood</i> , Random House, Rev. Ed. (1969)	16
Liley, "The Fetus As A Personality", 6 Aust. N.Z. J. Psych., 99 (1972)	15
<i>McRae v. Califano</i> , No. 76-C-1804 (E.D. NY Transcript, Au- gust 3, 1977, at pp. 99-101)	25
Nathanson, "Deeper Into Abortion", 291 New England Jour- nal of Medicine 1189 (1974)	15
NOTE, "Indigent Women — What Right To Abortion", 23 N.Y.L.S.L.R. 7096 (1978)	26
NOTE, "Limiting Public Funds for Abortions: State Response To Congressional Action", 13 Suffolk U.L.R. 923 (1979) ..	3, 4
Patten, B., <i>Human Embryology</i> , McGraw-Hill Book Com- pany, 3rd Ed. (1968)	15

	PAGE
Richardson & Dixon, "Effects of Legal Termination on Subsequent Pregnancy", 32 <i>Obstetrics & Gynecology Survey</i> 21 (1977)	18
Rosen, "The Patient's View of the Role of the Primary Care Physician in Abortion", 67 <i>American Journal of Public Health</i> 863 (1977)	25
Susman, " <i>Roe v. Wade</i> and <i>Doe v. Bolton</i> Revisited in 1976 and 1977", 22 <i>St. Louis U.L.J.</i> 589 (1979)	26
Tiefel, "The Unborn", 239 <i>J.A.M.A.</i> 2263 (1978)	15
Trichopoulos, et al., "Induced Abortion and Secondary Infertility", 83 <i>British Journal of Obstetrics & Gynecology</i> 645 (1976)	18
<i>Webster's Third New International Dictionary</i> , 2372 (1971) ...	26

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-4

**JASPER F. WILLIAMS, M.D. AND
EUGENE F. DIAMOND, M.D.,**

Appellants,

and

**ARTHUR F. QUERN, Director
Illinois Department of Public Aid**

Appellant,

and

THE UNITED STATES,

Appellant,

vs.

**DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their
own behalf and on behalf of all others similarly situated;
CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois
not-for-profit corporation, and JANE DOE, on her own behalf
and on behalf of all others similarly situated,**

Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this Appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL RIGHT TO LIFE COMMITTEE, INC.

The National Right to Life Committee, Inc. is a non-profit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 1,000 local chapters made up of individuals from every race, denomination, ethnic background and political belief. It engages in various political, legislative, legal and educational functions to protect and promote the concept of the sanctity of human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting government funding of abortions to only those instances in which the mother's life is in danger. As opponents of abortion on demand, taxpayer funding of abortion is repugnant to their beliefs. The Hyde Amendment to the appropriations bill for the Department of Health, Education and Welfare and the Illinois limitation on state funding of abortion herein are the results of lobbying, in great part, by the members of the National Right to Life Committee and its affiliates. By means of this brief, the National Right to Life Committee seeks to advance these interests by supporting the legality of the abortion funding restrictions to be reviewed herein.

BRIEF AMICUS CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Appellant Brief of Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.

SUMMARY OF ARGUMENT

The primary issue of the appeal is, simply stated, whether the government is required by the Constitution or Title XIX of the Social Security Act, because of its interest in maternal health, to pay for abortions for indigent women. This issue is one properly left to legislative resolution and this Court should not determine the wisdom of an enactment which provides government funds for abortions in certain enumerated instances.

The right of privacy has been interpreted by this Court to extend to a woman's right to decide whether or not she desires an abortion. This right is not the same as the right to have the government pay for that abortion. The latter cannot be said to be part of the right of privacy. The state is under no obligation to put any citizen in a financial position to exercise a fundamental right, whether it be the right to have an abortion, to travel, to attend a private school, or to exercise religious freedom.

In addition, failing to provide government funds for the rich, while providing it for the poor, does not violate equal protection nor does providing funds for abortions to treat women with certain life threatening conditions discriminate invidiously against other women who are demanding abortion funds.

Since the right to have taxpayers pay for abortions is not a fundamental right, only a rational basis is required to uphold the instant abortion funding restrictions. The government interests in

childbirth, fiscal frugality, maternal health, and neutrality on abortion provide an adequate justification for such laws.

The Social Security Act represents a system of state/federal cooperation. As a result, the Medicaid Act does not mandate that the states fund any abortions as a condition to participate in the program particularly when federal reimbursement is denied.

Assuming that the federal government's restriction on abortion funding is unconstitutional, the Appropriations Clause of the United States Constitution prohibits this Court from ordering payment for abortions beyond the limitations established by Congress.

ARGUMENT

I

The Congressional and Illinois Limitations on Government Funding of Abortions for the Indigent Do Not Violate the Fourteenth Amendment to the United States Constitution.

Both Congress¹ and Illinois² have enacted restrictions on payment of government funds for abortions for indigent women through Title XIX (The Medicaid Provision) of the Social Security

1. §210 of Pub. L. 95-480, 92 Stat. 1586 (1978):

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

2. P.A. 80-1091, Ill. Rev. Stat. ch. 23, §5-5 (1977 Supp.):

"The Illinois Department, by rule, shall determine the quantity and quality of

(continued)

Act. Such restrictions are typical of those adopted by many states who have attempted to limit abortion funding to those with some medical justification. The funding limitations, however, have varied widely with many states limiting abortion funding to abortions necessary to preserve the life of the mother. See, NOTE, "Limiting Public Funds for Abortions: State Response to Congressional Action", 13 Suffolk U.L.R. 923, 943-945 (1979). It is the government's right to control the expenditure of tax money that is under attack in the instant case.

(1) THE WOMAN'S RIGHT OF PRIVACY

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that the

the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following:... but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, Ill. Rev. Stat. ch. 23, § 6-1 (1977 Supp.):

"Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, Ill. Rev. Stat. ch. 23, §7-1 (1977 Supp.):

"Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care,...except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child."

right of personal privacy included the right of a pregnant woman to decide whether or not to have an abortion. Therefore, this Court invalidated a Texas statute which prohibited all abortions except those procured for the purpose of saving the life of a mother, *Roe v. Wade, supra*, 410 U.S. at 164. In reaching this decision, the Court stated that during the first trimester of pregnancy, "the attending physician, in consultation with his patient, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the decision may be effectuated by abortion free of interference by the state." *Roe v. Wade, supra*, 410 U.S. at 163.

In the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), the U.S. Supreme Court, among other things, struck down Georgia's abortion statute which required that the abortion must be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. *Doe v. Bolton, supra*, 410 U.S. at 194. After noting that such a requirement is not imposed on the performance of nonabortion surgery, *Doe v. Bolton, supra*, 410 U.S. at 193, the Court found that it violated equal protection of laws because it was not "based on differences that are reasonably related to the purposes of the act in which it is found." *Doe v. Bolton, supra*, 410 U.S. at 194.

In interpreting the *Roe v. Wade* and *Doe v. Bolton* decisions together, the Eighth Circuit in *Word v. Poelker*, 495 F.2d 1349, 1350-51 (8th Cir. 1974), found the following principles:

(1) The "fundamental" right of privacy includes the abortion decision. *Roe v. Wade, supra*, 410 U.S. at 153-156.

(2) Even so, no woman has a right to an abortion "at whatever time, in whatever way and for whatever reason she alone chooses;" there is no right to abortion on demand. *Roe v. Wade, supra*, 410 U.S. at 153, *Doe v. Bolton, supra*, 410 U.S. at 189.

(3) The state interest in protecting the health of the pregnant woman and the separate interest of protecting poten-

tial human life become compelling at certain points in the pregnancy term (at the end of the first and second trimesters respectively) then and there affording the state the opportunity to reasonably regulate the abortion procedure. *Roe v. Wade, supra*, 410 U.S. at 162-164; *Doe v. Bolton, supra*, 410 U.S. at 194-195.

(4) The state regulation must be reasonably and legitimately related to the recognized state interest set out above. *Roe v. Wade, supra*, 410 U.S. at 162-166. *Doe v. Bolton, supra*, 410 U.S. at 194-195.

(5) Prior to the compelling points (during the first trimester of the pregnancy term) the abortion decision and its effectuation is "inherently, and primarily a medical decision, and basic responsibility for it must rest with the physician." *Roe v. Wade, supra*, 410 U.S. at 166. See also *Doe v. Bolton, supra*, 410 U.S. at 192-200.

Early cases interpreting *Roe v. Wade* and *Doe v. Bolton* overreacted to these decisions and held that absolutely no regulation of the abortion decision or its effectuation in the first trimester was constitutional. See *Arnold v. Sendak*, 416 F. Supp. 22 (S.D. Ind. 1976), *aff'd.*, 429 U.S. 968 (1976); *Coe v. Gerstein*, 517 F.2d 787 (5th Cir. 1976), *aff'd.*, 428 U.S. 901 (1976); *Friendship Medical Center v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Word v. Poelker, supra*; *Doe v. Zimmerman*, 405 F. Supp. 534 (M.D. Penn. 1975); *Hallmark Clinic v. North Carolina Department of Human Resources*, 380 F. Supp. 1153 (E.D.N.C. 1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973).

This Court, however, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), reversed this trend by holding that not all abortion regulations that apply to the first trimester are unconstitutional and that regulations dealing with abortion are not unconstitutional merely because the state does not impose similar burdens on other medical procedures. *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978). Abortion, unlike other medical procedures, involves the termination of potential human life. *Maher v. Roe*, 432 U.S. 464 (1977).

This view is supported by other recent Supreme Court decisions which have emphasized that the abortion decisions, while recognizing a constitutionally protected interest "in making certain kinds of important decisions" free from governmental compulsion, *Whalen v. Roe*, 429 U.S. 589 (1977), are "not absolute." *Carey v. Population Services International*, 431 U.S. 678 (1977). "As *Whalen* makes clear, the right in *Roe v. Wade*, *supra*, can be understood only by considering both the woman's interest and the nature of the state's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion...' Rather, the right protects the woman from *unduly burdensome* interferences with her freedom to decide whether to terminate her pregnancy (emphasis supplied)." *Maher v. Roe*, *supra*, 97 S. Ct. at 2382. In addition, "not all distinction between abortion and other procedures is forbidden." *Bellotti v. Baird I*, 428 U.S. 132, 145 (1976). The constitutionality of such distinction will depend upon the degree and the justification for it. *Bellotti v. Baird I*, *supra*, 428 U.S. at 145.

Thus, three tests have been established by this Court to determine whether or not abortion regulations are constitutional. First is whether or not the regulations effect the abortion decision or its effectuation. Where the obstacle does not impact upon the woman's freedom to make a constitutionally protected decision, or if they merely make the physicians work more laborous or less independent without any impact on the patient, *Whalen v. Roe*, *supra*, 429 U.S. at 604, the regulations are evaluated under relaxed standards of scrutiny and the state is afforded broader power to encourage actions thought to be in the public interest. These regulations are subject to the "less demanding test of rationality," *Maher v. Roe*, *supra*, 97 S. Ct. at 2385, and thus usually found constitutional. *Wynn v. Scott*, *supra*.

Second, if the regulation impacts upon the abortion decision, the Court must find as a matter of fact that this "burdens an individual's right to decide to...terminate pregnancy by substantially limiting access to the means of effectuating that decision." *Carey v. Population Services International*, *supra*, 97 S. Ct. at 2018. Every regulation, however, is not unconstitutional under this test. "The constitutionally protected right of privacy extends to an individual's liberty to make choices, (it) does not, however, auto-

matically invalidate every state regulation in this area." *Carey v. Population Services International*, *supra*, 97 S. Ct. at 2017. Thus, "a requirement for a lawful abortion" is not unconstitutional unless it *unduly burdens* the right to seek an abortion. *Bellotti v. Baird I*, *supra*, 96 S. Ct. at 2866. "Even a burdensome regulation (however), may be validated by a sufficient compelling state interest." *Carey v. Population Services International*, *supra*, 97 S. Ct. at 2017. To determine if the woman's due process rights are violated, therefore, the Court must find as a matter of fact that the regulation *unduly burdens* the abortion decision *and* is not supported by a compelling state interest. If it is not unduly burdensome, the provisions need only be reasonably related to a rational state interest.

Thirdly, whether or not the abortion regulation makes an unconstitutional distinction between the abortion decision and other comparable surgical procedures such that it would violate equal protection of the law. However, "not all distinction between abortion and other procedures is forbidden...the constitutionality of such distinction will depend upon its degree and the justification for it." *Maher v. Roe*, *supra*, 97 S. Ct. at 2382; *Bellotti v. Baird I*, *supra*, 96 S. Ct. at 2867. Thus, the Supreme Court has upheld several abortion specific regulations as applied to the first trimester. See *Connecticut v. Menillo*, 423 U.S. 9 (1975), upholding the requirement that an abortion must be performed by a physician; *Planned Parenthood v. Danforth*, *supra*, upholding informed consent, recordkeeping and reporting requirements; and *Bellotti v. Baird I*, *supra*, suggesting that a form of parental and Court consent before a minor may obtain an abortion was constitutional. Thus, "There are no hard-and-fast rules for determining the limit of the regulation power. The facts in every case are crucial." *Aware Woman Clinic v. City of Cocoa Beach*, No. 77-361-Orl-Civ-Y (M.D. Fla., Memorandum Opinion, April 21, 1978) p. 20. To determine if the woman's equal protection rights are violated, therefore, the Court must find as a matter of fact that the degree of the differing treatment of abortion over other comparable surgical procedures is not justified by the difference between abortion and other comparable surgical procedures and any reasonable state interest.

In analyzing Illinois abortion funding restrictions, the District Court properly found that the right of privacy established in *Roe v.*

Wade, supra, and *Doe v. Bolton, supra*, was not implicated by the funding restrictions. *Zbaraz v. Quern*, 469 F. Supp. 1212, 1218 (N.D. Ill. 1979). This ruling was based upon the subsequent Supreme Court decisions in *Maher v. Roe, supra*, and *Poelker v. Doe*, 432 U.S. 519 (1977). In *Maher*, this Court explained that:

Roe did not declare an unqualified "constitutional right to an abortion", as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. *It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds...* *Maher v. Roe, supra*, 97 S. Ct. at 2382 (emphasis added).

As a result, the District Court found that no fundamental right was impinged and the government funding restriction was not subject to strict scrutiny.

The *Maher* decision was based in part upon the recognition that there is a fundamental difference between statutes that prohibit a woman from seeking an abortion and statutes that merely treat the subject of abortion and childbirth differently. As explained by the Court:

An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. *Maher v. Roe, supra*, 97 S. Ct. at 2382.

Thus to require the public to fund private implementation of private rights was found more than semantically absurd: it was logically inconsistent. Abortion is not in itself a constitutionally protected right. The Court in *Roe* had identified abortifacient freedom as a "negative" or "non-interference" right. Abortion was placed within a "zone" of privacy which the Constitution rendered impenetrable by the state unless its interests were sufficiently compelling. Within this private sphere, decisions reached and effec-

uated must be free from state interference — the state may not punish, burden, or obstruct inside those boundaries. However, the actors within the protected zone — the woman and her concurring physician — cannot venture forth beyond the parameters to demand public participation in their private decision without regard to the valid public interests at stake. They may not compel either private or public hospitals to provide abortion facilities nor may they compel the public to fund them. The claimants in *Maher* and *Poelker* had sought to force the state into this protected sphere of privacy thereby implicating the state in activities it was, at the same time, forbidden to proscribe or even regulate. This proposition did not tolerate close, reflective judicial analysis.

The fact remains, therefore, that no government is obligated to fund anyone's constitutional rights. Simply because there is a right to travel found in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the states would not be found to have "penalized" that right "by refusing to pay the bus fares of the indigent travelers." *Maher v. Roe, supra*, 97 S. Ct. at 2382. The right of parents to educate their children in private schools and choose curriculum without state interference, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), does not create fundamental rights with reference to equal public funding. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 30-31 (1973). Though one possesses the right of privacy to maintain pornographic material in the home, *Stanley v. Georgia*, 394 U.S. 557 (1969), it does not follow that traffic in obscene matter may not be proscribed, *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), much less that the government must purchase it for indigents simply because inoffensive fare is provided in public libraries.

Similarly, one of the most sacred fundamental rights of the people is to participate in the electoral process. Yet in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court ruled that the Federal Election Campaign Act was not unconstitutional because minority party candidates were effectively denied federal funds:

The Constitution does not require the Government to "finance the efforts of every nascent political group," (case cite omitted) merely because Congress chooses to finance the efforts of the major parties. Furthermore, appellants have made no showing that the election funding plan disadvantages

non-major parties by operating to reduce their strength below that attained without any public financing. *First, such parties are free to raise money from private sources...Buckley v. Valeo, supra*, 424 U.S. at 98-99 (emphasis added).

The final resolution of this semantic thicket requires the separation of the concept of force, hindrance, coercion or punishment that operates in an affirmative manner against personal rights and selective legislative policy which directs funds to be spent in a certain manner. The private rights affirmed in *Roe v. Wade, supra*, logically lose their fundamental character when thrust into the public forum. It would make little sense to interpret the Constitution to require abortion funding in *Maher* unless the Court was prepared to require implementation of a host of other rights far more explicit in the Constitution and essential to the operation of political democracy.

The *Maher* court also implicitly rejected the notion that abortion and childbirth are simply two different ways of coping with pregnancy. As a result, the court rejected the argument that, because a woman's private decision as to which alternative she would choose is constitutionally protected, the state may not influence that decision by subsidizing childbirth but not abortion.

For the purpose of constitutional analysis, abortion is not simply the other side of the coin to childbirth. The fundamental right of a woman to bear her child is unique. It is a constitutional right that stands absolute and unqualified. Regardless of the danger to herself or the circumstances attending her pregnancy, a woman has an absolute right to bear her child. The right of a woman to have an abortion, on the other hand, is not an absolute unqualified right because the state has a valid interest in unborn human life. *Roe v. Wade, supra*, 410 U.S. at 155.

At some point, the state interest in protecting prenatal life becomes dominant and the state may go so far as to proscribe the abortion procedure. *Roe v. Wade, supra*, 410 U.S. at 155. As stated by the court in *Roe v. Wade*, "...The pregnant woman cannot be isolated in her privacy. She carries an embryo, and later, a fetus, if one accepts the medical definitions of the developing

young in the human uterus. (Citation.) The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Roe v. Wade, supra*, 410 U.S. at 159.

Thus the fundamental difference between the right of a woman to bear her child and the right of a woman to abort her pregnancy is not difficult to pinpoint. Childbirth is the continuation of human life. Its legitimacy requires no explanation. Abortion on the other hand entails the termination of potential human life. To some it is the best, the kindest and the wisest solution to unwanted pregnancy. To others, it is plainly murder.

Thus, combining the right of a woman to bear her child with the right of a woman to have an abortion into a single constitutional right is a logical fallacy. These rights are separate and unique. They are governed by different constitutional principles.

In interpreting *Maher v. Roe, supra*, however, the District Court interprets the decision as only applying to "non-therapeutic" abortions, leaving open the question of whether or not the government may treat an indigent woman in medical need of an abortion differently from an indigent woman in medical need of other surgical procedures. *Zbaraz v. Quern, supra*, 469 F. Supp. at 1218. The District Court relied upon the fact that the Connecticut statute in *Maher* provided funding for "medically necessary" abortions and, thus, *Maher* only applied to "purely elective" abortions. *Zbaraz v. Quern, supra*, 469 F. S. at 1219.

An analysis of the restrictions on abortion funding in *Beal v. Doe*, 432 U.S. 438 (1977), *Maher* and *Poelker* reveals that this Court was not basing its decision to uphold regulations allowing abortions upon "medical necessity." In *Beal*, an abortion,

for which Pennsylvania would provide funding, was defined by regulation as medically necessary when pregnancy could threaten a woman's health, when pregnancy resulted from rape or incest and would constitute a threat to a woman's mental or physical health, and when an infant would possibly be born with an "incapacitating physical deformity or mental deficiency." *Beal v. Doe, supra*, 97 S. Ct. at 2369 n. 3. In *Maher*, the Connecticut regulation provided funding for medically necessary abortions, a term including psychiatric necessity. *Maher v. Roe, supra*, 97 S. Ct. at 2378 n. 2. In both of these cases, the Court referred to abortions funded under the regulations as "therapeutic" and abortions not so funded as "elective."

In *Poelker*, it was argued that the refusal of a city-owned hospital to provide the plaintiff an abortion violated her constitutional rights. The plaintiff was unable to obtain an abortion at the hospital for two reasons. The hospital was staffed by doctors from a nearby Catholic medical school who were opposed to abortion, and a directive from the mayor of the city prohibited abortions at the hospital except in circumstances posing "a threat of grave physiological injury or death to the mother." *Poelker v. Roe, supra*, 97 S. Ct. at 2392. As a result, no abortions whatsoever had been performed in Starkloff Hospital, *Doe v. Poelker*, 515 F.2d 541, 548 (8th Cir. 1975), since the mayor's directive was interpreted as permitting abortions "only if the life of the mother was in danger." *Doe v. Poelker, supra*, 515 F.2d at 543. The plaintiff, who desired an abortion because of personal family and financial problems and because of the fact that she had suffered five prior miscarriages caused by cervical fibroid tumors and polyps, an extremely retroverted uterus, and trichomycosis, was denied an abortion at the hospital. *Doe v. Poelker, supra*, 515 F.2d at 542-43. This court found the case "identical in principle" to *Maher* and referred to those abortions not provided by the city hospital as "non-therapeutic". *Poelker v. Doe, supra*, 97 S. Ct. at 2397.

In reviewing these facts, the District Court in *Doe v. Mundy*, 441 F. Supp. 447 (E.D. Wisc. 1971), observed that "the plaintiffs' assertion that the Court carefully defined 'therapeutic abortion' co-extensively with 'medically necessary abortion' does not account

for this nonconforming definition of a non-therapeutic abortion in *Poelker*. Instead of deciding, on remand from the Supreme Court, that the hospital had to provide abortions consistent with 'medical necessity' as defined in *Maher*, the court of appeals for the eighth circuit vacated its own opinions and affirmed the district court decision which had denied the woman relief. *Doe v. Poelker*, 558 F.2d 1346 (8th Cir. 1977)." This fact only underscores the notion that *Beal*, *Maher*, and *Poelker* did not differentiate between medically necessary and elective abortions. They were simply affirming the right of the state to fund whatever abortions they wished. See also, *D.R. v. Mitchell*, 456 F. Supp. 609 (D.C. Utah 1978); *Woe v. Califano*, 460 F. Supp. 234 (S.D. Ohio 1978); *Freiman v. Walsh*, No. 77-4171-CV-C (W.D. Mo., Memorandum Opinion, Jan. 26, 1979); *Committee To Defend Reproductive Rights v. Myers*, No. 1 Civil 45066 (Calif. App., Memorandum Opinion, May 29, 1979).

Also of note is the opinion of the Secretary of Health, Education and Welfare on whether or not states must fund medically necessary abortions. In an *amicus brief* filed in *Freiman v. Walsh, supra*, on August 26, 1977, the Secretary stated that:

...The issue before this Court is whether the state can constitutionally determine that it will not provide funds for abortions except where "a full-term pregnancy would cause a cessation of the mother's life." The Supreme Court's decision in the case of *Maher v. Roe*, 432 U.S. _____, 45 U.S.L.W. 4787 (June 21, 1977), suggests that the answer must be in the affirmative.

This opinion is particularly persuasive since the Secretary is charged with the administration of the Medicaid program. As the Supreme Court observed in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corporation*, 360 U.S. 411, 420 (1959), to hold that an issue is:

...ultimately for judicial rather than administrative resolution...does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant...facts which the administrative agency charged with regulation of the transaction...is peculiarly well equipped to marshal and initially to evaluate...

See also *Far East Conference v. United States of America*, 342 U.S. 570, 574-575 (1952); *Rosada v. Wyman*, 397 U.S. 407 (1970); and *Mathews v. Eldridge*, 424 U.S. 319 (1976). As a result, the Secretary's opinion should be given special weight. It is important to note that this Court declared *no limitation* by *Roe* upon a state that wishes to fund childbirth over abortion. There is no language qualifying "abortion". There is no hairsplitting concerning therapeutic abortions. Most important is the court's rationale concerning indigent women. This rationale rejects the concept that indigency automatically begs a deprivation of constitutional rights. An indigent woman "continues...to be dependent on private sources." *Maher v. Roe*, *supra*, 97 S. Ct. at 2382-2382. What is the difference then between an indigent woman who wants an elective abortion and one whom a doctor claims would need a "therapeutic" abortion? Will not the "private source" be available also for the woman who needs a "therapeutic" abortion?

(2) EQUAL PROTECTION IN ABORTION FUNDING

In analyzing the constitutionality of the limitations on government abortion funding established by Congress and the State of Illinois, the District Court applied the equal protection analysis. *Zbaraz v. Quern*, *supra*, 469 F. S. at 1216. Correctly, the District Court determined that no suspect class was involved and the laws did not impinge upon a fundamental right, therefore requiring only a rational state interest to support the enactments. In so doing, however, the court mistakenly assumed that the restrictions herein must pass muster under the equal protection clause. In refusing to fund some abortions, the District Court reasoned that the statutes treated different classes of individuals differently, i.e. indigent women in medical need of abortions and indigent women in medical need of other surgical procedures. In fact, these statutes do not classify *persons* as such; they classify *services* demanded by those persons. See *Geduldig v. Aiello*, 417 U.S. 484, 494-98 (1974). Since the Constitution requires equal protection of persons, but not services, and anyone can choose the assisted or unassisted services, the equal protection analysis does not apply and only a rational basis is necessary to find the legislation constitutional. This analysis insures that the laws are not wholly arbitrary or capricious. See *San Antonio School District v. Rodriguez*, *supra*, 411 U.S. at 59-61.

(3) THE RATIONAL INTERESTS SERVED BY THE ABORTION FUNDING RESTRICTIONS

The Supreme Court has recognized at least five state interests sufficient to justify regulation of the abortion procedure. These interests are "in safeguarding health, in maintaining medical standards...() in protecting potential life," *Carey v. Population Services International*, *supra*, 97 S. Ct. at 2017, "in favoring childbirth over abortion," *Maher v. Roe*, *supra*, 97 S. Ct. at 2382, and in insuring that the abortion decision is made "with full knowledge of its nature and consequences." *Planned Parenthood v. Danforth*, *supra*, 428 U.S. at 66. In addition, there are other interests that may be served in the instant case since regulation of the abortion decision is not involved. The following are four separate interests served by these acts which provide a rational basis for their enactment.

(a) Childbirth

The Supreme Court has found that the State has a legitimate interest in potential life. This interest which "grows in substantiality as the woman approaches term and, at a point during pregnancy...becomes compelling," *Roe v. Wade*, *supra*, 410 U.S. at 163, is based upon the fact that the unborn child is an independent human being. Liley, "The Fetus as a Personality" 6 Aust. N.Z.J. Psych 99 (1972); Tiefel, "The Unborn", 239 JAMA 2263 (1978).

The humanity of the unborn has been widely recognized. Medical textbooks have treated the combination of the sperm and egg as the definite beginning of a new individual. Arey, L., *Developmental Anatomy*, W.B. Saunders Corp., 7th Ed. (1974), p. 55; Patten, B., *Human Embryology*, McGraw-Hill Book Company, 3rd Ed. (1968), p. 41; Gilbert, M., *Biography of the Unborn*, The Williams and Williams Company (1938), p. 2. Even those who advocate abortion on demand and have participated in thousands of abortions recognize the fact that the content of the pregnant uterus is a human life. Editorial, "A New Ethic for Medicine and Society," 113 Calif. Med. 67 (1970); Nathanson, "Deeper into Abortion," 291 New England Journal of Medicine 1189 (1974). With a pregnant woman, "two people are involved, the mother and

her child." Liley, H.M.I., *Modern Motherhood*, Random House, Rev. Ed. (1969), p. 207.

Because of this potential life, the state has a "strong and legitimate interest in encouraging normal childbirth." *Beal v. Doe*, *supra*, 97 S. Ct. at 2372. This interest is sufficient to justify the state's refusal to fund abortion, *Maher v. Roe*, *supra*, 97 S. Ct. at 2385, and refusal to permit abortion in public hospitals. *Poelker v. Doe*, *supra*. This interest is sufficient to support state regulations which do not interfere with the woman's right by leaving her in the same position as she would be without them. *Wynn v. Scott*, *supra*, 449 F. S. at 1308.

(b) Maternal Health

The Supreme Court has also recognized the interest of the state in maternal health as justifying regulation of the abortion procedure. This interest also increases as the term of the pregnancy increases and becomes compelling at the end of the first trimester. *Roe v. Wade*, *supra*, 410 U.S. at 163. During the first trimester, however, the state still has an interest in health that can support non-burdensome regulations. *Wynn v. Scott*, *supra*. As a result, the U.S. Supreme Court has upheld the requirement that a physician perform the abortion, *Connecticut v. Menillo*, *supra*, and that the physician keep records and make reports, *Planned Parenthood v. Danforth*, *supra*, as reasonable regulations supported by the state interest in maternal health. After the first trimester, the state's interest in maternal health is sufficient to support requirements as to the qualifications of the person who is to perform the abortion and as to the facility in which the procedure is to be performed. *Roe v. Wade*, *supra*, 410 U.S. at 163. The state's interest in maternal health, regardless of the degree, continues through the whole pregnancy.

The District Court, however, concluded that the state's interest in maternal health was not advanced by the funding restriction since most health problems associated with pregnancy which would justify an abortion are not life-threatening, therefore, not funded. As a result, the District Court claimed that there would be

a substantial increase in maternal morbidity and mortality among indigent pregnant women. *Zbaraz v. Quern*, *supra*, 469 F. Supp. at 1220.

The evidence does not support the District Court's dire prediction. The Center for Disease Control established a hospital surveillance project to determine the increased mortality and morbidity among Medicaid recipients from abortion-related complications. After reviewing data from the 13 states and the District of Columbia between October 10, 1977 and June 10, 1978, the CDC determined that there was *no increase in mortality or morbidity among Medicaid recipients as a result of funding restrictions*. Center for Disease Control, "Health Effects of Restricting Federal Funds for Abortion in the United States," 28 Morbidity and Mortality Weekly Report 37 (1979). The funding restrictions have not had an adverse health impact on Medicaid recipients.

In addition, the District Court did not consider many of the factors relating to maternal health which are relevant to a consideration of the health impact of abortion in comparison with childbirth. First, one abortion is not equivalent to one birth. Dr. Christopher Tietze, a noted pro-abortionist, for instance, estimates that two abortions are needed to avert one birth. Hearing before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, Ninety-third Congress, second session on SJ 119 & SJ 130, *Abortion — Part 2*, p. 52; U.S. Government Printing Office, 1976. This figure is probably conservative. Hardy, "Privacy and Public Funding", 18 Ariz. L.R. 903, 924 (1977). The maternal risk of death is 14.9 per 100,000 and the average abortion risk of death is 3.3 per 100,000. Cates et al, "Standardized Mortality Data Associated with Legal Abortion: United States, 1972-1975", 10 Family Planning Perspective 109 (1978). If the mortality risk to a woman for a full term pregnancy is compared with two or three abortions, they approach equivalency.

The District Court's analysis also does not consider the non-fatal complications of abortion which also are a consideration in maternal health. As delineated in *Privacy and Public Funding*, *supra*, at pages 929-930, the long term complication rates from

blood loss, infection, incomplete abortion, spontaneous abortion and premature delivery, and tubal pregnancy are high. Most disconcerting are the statistics which reveal the high incidence of fetal loss in subsequent pregnancies, Richardson & Dixon, "Effects of Legal Termination on Subsequent Pregnancy", 32 *Obstetrics & Gynecology Survey* 21 (1977), and sterility. Trichopoulos, et al., "Induced Abortion and Secondary Infertility," 83 *British Journal of Obstetrics & Gynecology* 645 (1976).

The latest statistics on abortion complications reveal the devastating long-term impact of abortions on the health of the mother and her infant in subsequent pregnancies. In the most comprehensive analysis to date, the National Institute of Child Health and Human Development of the Department of Health, Education and Welfare compared the rate of adverse pregnancy outcomes among more than 20,000 women with a prior record of induced abortion with a matched number of women with no prior recorded induced abortion. Appendix, p. 1. The preliminary results were startling. The women with prior induced abortions suffered:

- (1) 85% higher incidence of spontaneous fetal deaths,
- (2) 32% higher incidence of low birth weight infants (often associated with birth defects),
- (3) 67% higher incidence of early gestational infants (also often associated with birth defects),
- (4) 47% higher incidence of labor complications, and
- (5) 83% higher incidence of delivery complications.

The conclusion is inescapable. In addition to the immediate complications most often reported, the long term detrimental health impact of abortion is often devastating. Such factors must be considered in analyzing maternal health. Considered in toto, therefore, a reasonable basis exists for the legislature to restrict abortion for the purpose of maternal health.

(c) Fiscal Frugality

With the passage of Proposition 13 in California, the importance of the government's fiscal interest in allocating scarce state funds is brought into even clearer focus. The District Court, however, found that this interest was not served since the cost of an abortion is less than the cost of childbirth. Here again, the District Court failed to take into consideration numerous other factors which demonstrate the favorable fiscal impact of these restrictions.

1. The Fiscal Interest Cannot Be Narrowed to a Simple Comparison of the Relative Costs of Abortion and Birth

The District Court has adopted a strange view of the ability of a state to consider its own fiscal interests. In maintaining there can be no state fiscal interest in curtailing "medically necessary" abortions because the costs of birth and welfare are greater than those of abortion, they seemingly say at one and the same time that the state cannot look merely at the cost of the abortion, because that is too short-term, but neither can it look beyond the costs of birth and early dependency, because that is too long-term. They exclude the long-term fiscal benefits of a child's life to the state, focusing only on the fiscal burdens.

Not just the children of the poor, but all children, are dependent and consume, rather than produce, resources. If both the state and the individual parents, who make up the society of citizens which the state represents, were to consider only the fiscal elements related to the first years of life, all children would be aborted. Of course, if a society or parents were to restrict their thinking to purely fiscal considerations, this thinking would not be restricted to such short-term reasoning. They recognize that the child who needs support and care now will in all probability eventually pay back these costs to society — with considerable interest.

In the allocation of its funds, any governmental body is constantly faced with balancing short-term benefits and costs against long-term benefits and costs. Given limited resources, difficult choices must be made. For example, health care money

must be allocated between medical research, which may hold out the promise of eventual cures and future savings from a consequent drop in expense of care, on the one hand, and financial assistance to help with the medical costs of those who need treatment now, on the other. Similarly, any local community constantly must choose where to build its roads, and when to repave, repair, or neglect them. If the District Court's view were to prevail, it could be maintained that a town which failed to construct a new road was behaving irrationally because in the medium term the construction of such a road would, in the view of some court, later save more money. At the same time a town which chose to build, say, an arterial highway, so as to anticipate the needs of the next two or three decades, in preference to building a more ordinary road which would fulfill the needs of traffic for the next few years, would have to be said to be acting irrationally since it was planning for the long — instead of the middle — term.

The decisions of this nature are to be made by the democratic process. The impropriety of judicial interjection into this area of delicate balances should be evident. Inherent in the complexity of the balancing of present and future fiscal interests is the fact that there are a wide variety of alternative courses which would be reasonable for the legislators to adopt. The limitation of funding for abortion certainly falls within that broad spectrum of reasonability.

Our system of government is based upon a sharing of power among three branches. It is the responsibility and prerogative of the legislature to weigh their "wisdom or social desirability" for as the Supreme Court held in *Maher v. Roe*, *supra*, 432 U.S. at 479-480, the judiciary "does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), quoted in *Dandridge v. Williams*, *supra*, at 484...We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J)."

2. It Is Reasonable for the State to Conclude That Abortion is Less Expensive Than Childbirth and Thus to Choose to Limit Abortion Funding as a Means of Conserving Its Fiscal Resources

The legislature has the discretion to conclude that, even on the short-sighted level of comparison to which the District Court insists the state is restricted, the analysis which suggests that abortion is less costly than birth is simplistic. In the detailed and documented study, *Privacy and Public Funding*, *supra*, substantial evidence is presented that the availability of free abortion tends to decrease contraceptive use and increase pregnancies to the point at which two or three abortions are necessary to avert one birth. When abortion is used as a method of birth control, the one-to-one comparison of abortions to births as alternative pregnancy outcomes simply does not hold. Hardy shows that this may well mean that though the cost of any given abortion is less than the cost of any given birth, when it is multiplied by a factor which takes this greater frequency into account, the cost to the state of funding abortions may well exceed that of funding any births induced by the unavailability of Medicaid reimbursement for abortions. Furthermore, he summarized mounting evidence that abortion complications, both currently reported and projected, may lead to Medicaid costs greatly in excess of those associated with pregnancy complications. Finally, he demonstrates that the administrative burden imposed on health care facilities by the easy availability of free abortion is great. A reading of Hardy's section on these points, *Privacy and Public Funding*, *supra*, at 925-933, discloses that the state cannot be held to be unreasonable in its conclusion that its fiscal interest is served by refusing to fund abortions not necessary to preserve maternal life.

(d) Neutrality on Abortion

By refusing to pay for most abortions, the state has removed itself from involvement in the abortion controversy. Such neutrality is appropriate since there are wide differences of opinion regarding the morality of this procedure.

A similar approach was taken by the U.S. Congress in prohibiting courts from compelling hospitals to perform any sterilization

procedure which would violate the hospitals' religious or moral belief. 42 U.S.C. §300a 7(a). This Act was upheld on the basis that it preserved "government neutrality in the face of religious differences." *Chrisman v. Sisters of St. Joseph*, 506 F.2d 308, 311 (9th Cir. 1974).

It is one thing for the taxpayer to recognize a woman's right to an abortion; it is quite another for the taxpayer to be compelled to contribute financially to her exercise of that right. It is well established that the state may restrict the use of public funds for purposes that might indicate a lack of tolerance for the beliefs of many of its taxpayers, see *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-24 (1961); *Falkenstein v. Department of Revenue*, 350 F. Supp. 887, 889 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973); see also *Reitman v. Mulkey*, 387 U.S. 369, 379 (1967); even if it could not restrict those activities were they privately supported. *Williams v. Eaton*, 468 F.2d 1079, 1084 (10th Cir. 1972). As carefully delineated in *Privacy and Public Funding*, *supra*, pages 933-938, a substantial number of persons find the state's policy of funding abortion to be strongly repugnant. In the light of the conflicting class of opposing groups and the availability of private resources, it is rational for the government to take a path of neutrality in the abortion funding decision.

(4) BALANCING OF INTERESTS

In spite of a recognition that the government has a legitimate interest in childbirth, the District Court held that, because of the state's interest in maternal health, the state could not restrict government funding for "medically necessary" abortions until viability. *Zbaraz v. Quern*, *supra*, 469 F. Supp. at 1221. The interest in maternal health was deemed superior and excluded all other, otherwise legitimate, interests.

The District Court misapplied the rational basis test. Instead of determining that a recognized government interest, i.e., childbirth, provided a rational basis for the restriction and upholding the act, the District Court sought to weigh against it any other valid govern-

ment interest to determine which was pre-eminent. Upon finding that maternal health was the most important interest the state might advance, the District Court prohibited the government from advancing its other legitimate interests and mandated government funding of abortions. Such a balancing of interests is not a function of the court. This court had held that, consistent with the Equal Protection clause, a state "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislators' minds...the legislators may select one phase of one field and apply a remedy there, neglecting the others...", *Williamson v. Lee Optical Co.*, *supra*; *Jefferson v. Hackney*, 406 U.S. 535 (1972). "The Equal Protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471 (1970).

The Equal Protection clause, therefore, does not require a state to pay for abortions for indigent women because of its interest in maternal health. Indeed, this court has held that the Equal Protection clause does not require a state to pay for *any* pregnancy related cost while it pays for most other medical risks. In *Geduldig v. Aiello*, *supra*, this Court upheld a California disability insurance system for private employees disabled from work by an injury or illness who were not covered by Workmens' Compensation despite the fact that the plan paid for *no* expenses related to a normal pregnancy. This funding restriction was found to comply with the equal protection clause because it was supported by the state's legitimate interests in maintaining the self-supporting nature of the program, in distributing available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered rather than to cover all disabilities inadequately, and in maintaining contribution rates at a level that will not burden participating employees. *Geduldig v. Aiello*, *supra*, 417 U.S. at 496. This restriction was upheld despite the fact that *the State's interest in fiscal frugality was advanced at the cost of maternal health*. This court simply held that since the restriction was supported by a rational state interest, it would be upheld.

The ramifications of the District Court's analysis are broad. If the state's interest in maternal health is predominant, wouldn't

government funding for abortions after the first trimester (where childbirth is undisputedly safer for the mother than abortion) be unconstitutional? If the state's interest in maternal health and childbirth must be weighed, wouldn't abortion funding after viability be unconstitutional because of the state's compelling interest in childbirth? If the state chose to fund abortions but not childbirth because of overpopulation, wouldn't such funding be unconstitutional after the first trimester because of the state's interest in maternal health and after viability because of the state's interest in childbirth? The balancing and weighing of interests is simply inappropriate and not required. As long as the state's action is taken to advance some rational state interest, it is constitutional.

(5) THE EFFECT OF THE DISTRICT COURT RULING

In actuality, there are few abortions which are needed for medical reasons. Between February 14, 1978 and September 30, 1979, the Health Care Financing Administration, which supervises reimbursement of states for Medicaid abortions, reported only 650 abortions performed because the pregnancy threatened severe and long lasting damage to the health of the woman and only 3,507 abortions performed because of life-threatening conditions. Appendix, p. 8. Assuming that the abortion rate for 1976 continued through September of 1979, more than 1,625,000 abortions were performed during that time. Center for Disease Control, *Abortion Surveillance 1976*, 16 (HEW Publication No. (CDC) 78-8205, 1978). Of the women seeking abortions, only 4.5% of those seeking a second trimester abortion and 10.00% of those seeking a first trimester abortion claim any medical indications. Most seek abortions for social and economic reasons. Appendix, p. 8.

Despite the fact that few women have any true medical reasons for abortion, those who perform abortions are willing to find medical indications simply because the pregnancy is early or the patient wants one.³ Such testimony belies the District Court's

3. See *Zbaraz v. Quern*, No. 77C4522 (ND Ill, Memorandum Opinion, June 13, (continued)

"encouragement" that physicians would deem as low as one-fifth of the abortions they perform as medically necessary. *Zbaraz v. Quern*, *supra*, 469 F. Supp. at 1221.

This situation is exacerbated by the fact that it is usually not a physician who is sought out for advice when pregnancy is suspected. Indeed, in one survey, less than 18% sought the advice of any physician when deciding whether or not to have an abortion and over 87% reported that the physician had absolutely no influence on their decision. Rosen, "The Patient's View of the Role of the Primary Care Physician in Abortion", 67 *American Journal of Public Health* 863 (1977). Part of the reason for the low influence rate of physicians is the fact that in abortion clinics the physician does not even see the patient until she is on the operating table, prepared for the abortion. Hausknecht, "Free Standing Abortion Clinics: A New Phenomenon", 49 *Bull. N.Y. Academy of Medicine* 985 (1973). The physician does not even diagnose the woman's condition before the procedure.

1978) where the court, in recognizing the problem presented by allowing the physician to define medical necessity, recognized that Dr. Zbaraz felt that all first trimester and most second trimester abortions were medically necessary since, during that time, abortion was medically safer than childbirth. Also see testimony of Dr. Hodgson in *McRae v. Califano*, No. 76-C-1804 (ED NY, Transcript, August 3, 1977, at pp. 99-101):

In my medical judgment every (pregnancy) that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.

In good faith, I would recommend on a medical basis, you understand, that, and it would be 100%...I think they are all medically necessary...

Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary because I am considering the woman's physical, mental, emotional and social and welfare and family and environment and all that...I am concerned with the quality of life not physical existence...If the words medically necessary came in I think I could live with it. If I could interpret it in my own way, however.

Q. It would be a good faith interpretation?

A. I could live with it.

The definition of therapeutic is as varied as the commentators upon it. Therapeutic has been defined to include only those necessary to preserve the life of the mother, *Webster's Third New International Dictionary* 2372 (1971), *Beal v. Doe, supra*, 97 S. Ct. at 2372 n. 12; *Doe v. Mundy, supra*; *D.R. v. Mitchell, supra*; *Woe v. Califano, supra*; NOTE, "Indigent Women — What Right to Abortion?", 23 N.Y. L.S.L.R. 709 (1978); those necessary to preserve the woman's life and health, *Doe v. Rose*, 497 F.2d 1112 (10th Cir. 1974); those necessary to preserve the woman's health as defined in *Doe v. Bolton, supra*, 410 U.S. at 192, *Smith v. Ginsberg*, No. 75-0380 CH (S.D. W.V., Memorandum Opinion, May 9, 1978); and those that are medically necessary. *Roe v. Casey*, 464 F. Supp. 487 (E.D. Penn. 1978); Susman, "Roe v. Wade and Doe v. Bolton Revisited in 1976 and 1977", 22 St. Louis U.L.J. 589 (1979). The three lower court decisions in this case adopted the medically necessary definition of therapeutic.

The result of the District Court's decision is to blur beyond comprehension the distinction created in *Maher* between elective and therapeutic abortions. If the court left it up to Dr. Zbaraz and Dr. Hodgson to determine which abortions shall be funded, all would be. This situation reinforces the wisdom of leaving it to the legislature to determine which, if any, abortions shall be funded. It is up to the legislature to decide whether no medical expenses incidental to pregnancy will be funded, as upheld in *Geduldig v. Aiello, supra*, some expenses but not others, *Williamson v. Lee Optical Co., supra*, only a percentage of all expenses, *Jefferson v. Hackney, supra*, or a ceiling on total expenses covered. *Dandridge v. Williams, supra*. "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Jefferson v. Hackney, supra*, 406 U.S. at 546. If the state may exclude payment altogether for normal pregnancy, even though such a condition often requires medical care and may involve a genuine risk to life, *Geduldig v. Aiello, supra*, 417 U.S. at 500 (Brennan, J., dissenting), while paying for treatment for other health threatening conditions, then the government may limit abortion funding to those threatening the woman's life.

II

The Illinois Limitation on Abortion Funding Under Medicaid Does Not Violate Title XIX of the Social Security Act.

The Plaintiff below argued that the Illinois limitation on abortion funding under Medicaid violates Title XIX of the Social Security Act by not funding all medically necessary abortions. In addition, the Seventh Circuit Court of Appeals below found that Title XIX of the Social Security Act required a participating state to fund all medically necessary abortions but only ordered Illinois to fund abortions which were reimbursable under the Hyde Amendment on the grounds that it was a substantive amendment to the Social Security Act. Title XIX of the Social Security Act does not support this interpretation.

(1) THE MEDICAID SYSTEM

The purpose of the Medicaid program, Title XIX of the Social Security Act, 42 USC §1396 *et seq.* (1970), is not one of guaranteeing to the citizens of the State the right to medical treatment for any particular items, but rather, to quote from the Preamble, 42 USC §1396, "of enabling each state, as far as practicable under the conditions of each state, to furnish...medical assistance" (emphasis added).

A State, which opts to participate in the Medicaid reimbursement scheme, is required to pay "part or all" of the costs for services in five general categories set forth in 42 USC §1396d(a). The States plan for providing reimbursement for the services is required by 42 USC §1396a(a)(17) to "include reasonable standards...for determining...the extent of medical assistance under the plan which...are consistent with the objectives of this (Title)." In so doing, each State is authorized to

Specify the amount and/or duration of each item of medical and remedial care and services that will be provided...Such items must be sufficient in amount, duration, and scope to reasonably achieve their purpose...(T)he state may not arbitrarily

deny or reduce the amount, duration or scope of such services to an otherwise eligible individual solely because of the diagnosis, type of illness, or condition. Appropriate limitations may be placed on services based on such criteria as medical necessity or those containing utilization or medical review procedures. 45 CFR §449.10(a)(5)(i).

Each State, therefore, has wide authority in specifying the extent of the medical assistance it will provide under the Medicaid plan with the limitation that if "a given item of medical assistance is made available in a particular amount, duration, and scope to any individual or individuals, it must be made equally available to all other individuals similarly situated in terms of eligibility and need." 42 USC §1396a(a)(10). What items of assistance "that will be provided" are left up to the State. "Nothing in the statute suggests that participating states are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal v. Doe, supra*, 432 U.S. at 444.

The lower courts found, however, that this regulation requires the State to use medical necessity as a criteria. This regulation, however, in emphasizing that the State may establish "appropriate limits," says that limitations may be based on criteria "such as" medical necessity and review procedures, without excluding other criteria of which these are only examples. The language "such as" renders inapplicable the maxim *inclusio unius est exclusio alterius*. As a result, "the regulating provision indicates that the 'medical necessity' criterion is merely illustrative of the types of criteria that may be employed to limit services, and nothing in the provision suggests a more restrictive criterion is prohibited." *D.R. v. Mitchell, supra*, 456 F. Supp. at 625.

In addition, the regulation requires that "the state may not arbitrarily deny or reduce the...scope of...services...solely because of the diagnosis, type of illness, or condition." The State of Illinois' choice not to fund certain abortions is not based upon "the diagnosis, type of illness or condition" *at all*. The condition of pregnancy, and any illnesses associated with pregnancy which may be diagnosed, are covered by Medicaid. Illinois is merely refusing to fund one alternative response to pregnancy.

As expressed by the district court in *D.R. v. Mitchell, supra*, 456 F. Supp. at 617-618, therefore:

These statutory and regulatory provisions lead inescapably to two basic conclusions. First, the participating state may select those procedures which it will fund under the Medicaid program and may determine the extent to which those procedures will be funded, placing "appropriate limits" on the services offered. Second, the discretion of the participating state is limited only by three factors: (1) the plan or standard adopted by a state must be reasonable; (2) Medicaid funds must be distributed equally and equitably among Medicaid recipients; and (3) the plan or standard must be consistent with the objectives of Title XIX.

The issue before the Court, therefore, is whether or not the restrictions placed on abortion funding by the Illinois legislature are reasonable, equitable and consistent with the objectives of the Medicaid Act.

(2) BROAD DISCRETION IN STATES TO DETERMINE FUNDING

The broad discretion afforded States in determining the "appropriate limitations" on the services offered is illustrated by several recent cases. In *Quern v. Manley*, 98 S. Ct. 2068 (1978), for instance, the U.S. Supreme Court dealt with a similar proposal of "cooperative federalism." There, Title IV-A of the Social Security Act had broad language authorizing wide eligibility for the emergency assistance program. The State of Illinois had implemented an emergency assistance program in which the eligibility requirements were defined significantly more narrowly than in the federal act. The court held that these limitations were within the reasonable discretion of the state.

The opinion contrasted the emergency assistance program with that for Aid to Families with Dependent Children (AFDC), noting that they had parallel statutory provisions which, in describing eligible persons, were "in terms of definition of the program for which federal funding is available", *Quern v. Manley, supra*, 98 S.

Ct. at 2079, but that while the AFDC reference to "dependent child" was later defined specifically in the statute, the emergency assistance term "needy child" was not later defined. Thus, the Court, held, Congress intended the AFDC language, but not the emergency assistance language, to be binding in its breadth upon the state. *Quern v. Manley, supra*, 98 S. Ct. at 2079. The parallel to 42 USC §1396 is remarkable. Here in describing eligible persons, the section defines the program for which federal funding is available. Like the emergency program, and unlike AFDC, the key term on which the plaintiffs rely is not later defined in the statute. "(N)ecessary medical services," like "needy child," is not "statutory language...that can reasonably be understood as imposing uniform standards...on every state program." *Quern v. Manley, supra*, 98 S. Ct. at 2079. Similarly, the language "as far as practicable under the conditions in that state," on which the Plaintiffs rely to establish broad state discretion is almost identical to the language in §1396.

The Court observed that "the very breadth of the potential reach of E.A. (Emergency Assistance) — to virtually any family with needy children of a certain age that faces a risk of destitution — argues against the inference that Congress intended to require participating states to extend aid to all who were potentially eligible under §406(e). A literal application of all of the §406(e) standards ...would create an entirely open ended program, not susceptible of meaningful fiscal or programatic control by the states." *Quern v. Manley, supra*, 98 S. Ct. at 2080. Precisely the same could be said of the standard, suggested by the lower courts, that all "necessary medical services" must be funded, without limitation by the state, upon physician demand.

In *District of Columbia Podiatry Society v. District of Columbia*, 407 F. Supp. 1259 (D.D.C. 1975), the District of Columbia had limited podiatry services available under the Medicaid program. The court, in a decision squarely on point, ruled against the plaintiffs' claim that all services claimed by any physician to be "medically necessary" need not be funded. The court emphasized that Congress intended to give the states considerable flexibility in deciding what items of medical assistance to provide. *District of*

Columbia Podiatry Society, supra, 407 F. Supp. at 1264.

In *Virginia Hospital Association v. Kenley*, 427 F. Supp. 781 (E.D. Va. 1977), the court upheld the state's imposition of durational limits on institutional care which limited reimbursable hospital stays to 21 days annually. The court ruled that these limits did not violate the comparability requirements of 42 USC §1396a(a)(10) or the best interest of recipients requirement of 42 USC §1396 (a)(19). It held that the limits were justifiable under the broad discretion states are given to allocate available resources "as far as practicable" by 42 USC §1396. It did so even though it found that for some recipients hospital stays for periods in excess of 21 days were "medically necessary," *Virginia Hospital Association, v. Kenley, supra*, 427 F. Supp. at 785, because it noted that under what is now 45 C.F.R. §449.10(a)(5)(i), a state may set reasonable standards defining the extent of medical service provided. The Court repeatedly stressed that the requirements of 42 USC §1396a apply only to services provided by the state plan — a qualification explicitly written into the statute. Thus, the requirements "do not define what the extent of the original coverage must be," *Virginia Hospital Association v. Kenley, supra*, 427 F. Supp. at 783. If this is true when a state plan provides for coverage of hospital stays, but limits them to 21 days, *a fortiori* it is true when, as here, the state does not seek to limit the duration of a service it provides, but rather implements a state plan which funds some abortions but not others.

Most appropriately, in *Beal v. Doe, supra*, the issue was whether Title XIX of the Social Security Act, under which participating states financially assist qualified individuals with regard to medical treatment, requires participating states to fund the costs of "nontherapeutic" abortions. The Supreme Court held that Title XIX does not require participating states to fund every medical procedure, but that each state is given broad discretion to determine how much medical assistance is reasonable and consistent with Title XIX; that it is not inconsistent with Title XIX to refuse to fund unnecessary, although perhaps desirable, medical services; that the Court would not presume that Congress intended to condition state participation in Medicaid upon the state's willingness to compromise its strong interest to encouraging normal

childbirth; and, given the fact that abortions were unlawful in most states at the time Congress passed Title XIX, it is not consistent to suppose that Congress intended to require, as opposed to permit, participating states to fund nontherapeutic abortions.

(3) STATES NEED NOT FUND "MEDICALLY NECESSARY" ABORTIONS

In spite of this authority, the lower courts found that a state must fund all medically necessary abortions. To do so would authorize the attending physician to determine when an abortion, performed on an indigent woman, is to be publicly funded. The resultant potential for abuse is extreme, considering that the attending physician's economic interest and the patient's self-conceived personal interest are in diametric opposition to the state's democratically determined interest in fetal life.

"Medically necessary" is a vague and amorphous term capable of extremely broad interpretation. Indeed, it has been the calculated effort of those displeased by the Supreme Court's decisions in *Beal* and *Maher* to obtain the same end heretofore denied them through the device of abusing physicians' discretion to label elective abortion "medically necessary." The dangers to the state's fiscal interests as well as to its interest in the unborn inherent in the vague notion of "medical necessity" is obvious. (See Section I)(5), *The Effect of the District Court Ruling*.

Here, the possible circumstances in which, under some interpretation, an abortion might be called "medically necessary" range from situations in which maternal death will occur within minutes without surgery (as when a tubal pregnancy ruptures) to a case in which Dr. Hodgson hears a woman who desires to abort her pregnancy. In exercising its authority to formulate limitations based upon the degree of medical necessity, the state balances its interests in maternal health and in not financing elective abortions to come up with language which protects both interests while, as with all legislative compromises dealing with potentially competing

interests, necessarily entailing the partial curtailment of the complete fulfillment of either interest in order not to sacrifice all of the other interest.

Only by drawing some clear line in the vast grey area of "medical necessity," as the state of Illinois had done, can it avoid funding elective abortions and thereby protect its interests in unborn human life. As Judge Anderson observed, a standard of "medical necessity" determined purely by the physician would mean that "a 'therapeutic' abortion must include any lawful abortion that would make the pregnant woman feel better." *D.R. v. Mitchell, supra*, 456 F. Supp. at 623. In enjoining the enforcement of the Illinois statute, the District Court gave lip service to the state's theoretical right to exclude elective abortion from its funding, but in practice would deprive the state of the only available means it has of exercising this right. In the light of such expressions, surely the state may reasonably take precautionary measures to limit abortion funding.

(4) THE PASSAGE OF THE HYDE AMENDMENT FURTHER BUTTRESSES THE CONTENTION THAT TITLE XIX OF THE SOCIAL SECURITY ACT DOES NOT MANDATE THE FUNDING OF "MEDICALLY NECESSARY" ABORTIONS

It makes little sense to concede, on the one hand, that Congress was concerned enough about the use of taxpayer monies to pay for abortions that it passed the restrictive Hyde Amendment, and, on the other hand, to argue that Title XIX, also a product of Congress, mandates full state payment for the whole range of abortions. In other words, had Congress felt at the time the Hyde Amendment was enacted that Title XIX already mandated what Hyde intended to restrict, they would have amended Title XIX.

There are two reasons why Congress chose an appropriations amendment to limit federal participation in abortion funding. First, as already pointed out above, Title XIX was never intended to mandate across the board the services for which states must pay. Only the broad categories were outlined. Title XIX is primarily concerned with the groups of eligible persons for medical assistance

and, to that end, *appropriations* of the federal funds were made for reimbursement to the states according to their designated plans. Rather than destroy the concept of "cooperative federalism" by directly amending Title XIX, Congress chose the method of *dis*-appropriating federal funds for most abortions. The various states, therefore, were free to decide whether to continue funding abortions on their own.

Second, Title XIX was originally enacted in 1965, eight years before the U.S. Supreme Court decisions of *Roe v. Wade, supra*, and *Doe v. Bolton, supra*. At the time of the enactment of Title XIX, 46 of the 50 states (including Illinois) proscribed abortion altogether. Two states permitted abortion for "health" reasons Alabama, Code Title 46 §270 (Supp. 1963), and Oregon, Ore. Rev. Stat. §163.060 (1964); two states permitted abortion when pregnancy presented a grave threat to life or health, Colorado, Colo. Rev. Stat. §40-2-23 (1964), and New Mexico, N.M. Stat. Ann. §40A-5-1-3 (1964). Thus, 48 of the 50 states in 1965 did not even contemplate a definition of permissible abortion as broad and all-encompassing as the lower courts claim Title XIX "mandated." Therefore, any discussion of the legislative intent of Title XIX which does not deal with the historical content in which it was enacted is flawed. This canon of construction is mandatory; "special rules of construction" may not be adopted to escape its application. *Burns v. Alcala*, 420 U.S. 575, 580 (1975).

In *Beal*, the respondents were forced to rely solely upon the fact that abortion was not expressly excluded when Congress amended Title XIX to include "family planning services" within the broad categories of required services, as reason to believe that Congress henceforth intended to require abortion funding. This Court concluded that:

(t)his line of reasoning is flawed. The failure to exclude abortions from coverage indicates only that Congress intended to *allow* such coverage, not that such coverage is mandatory for nontherapeutic abortions. *Beal v. Doe, supra*, 432 U.S. at 446 n. 10. (Emphasis added.)

The court's conclusion was obvious in view of the fact that the Act

was so amended in 1972, before the decision in *Roe v. Wade*, in 1973 which legalized abortion. But in further support of its conclusion, the court noted that

(a)t the time of our 1973 decision in *Roe*, some eight years after the enactment of Title XIX, at least 30 states had statutory prohibitions against nontherapeutic abortions. *Beal v. Doe, supra*, 432 U.S. at 447 n. 12.

It is important to recognize that when the Supreme Court in *Beal* used the term "therapeutic" abortions, it was referring to abortions performed to save the life — as opposed to merely the health — of the mother, since of the "30 states" the court indicated proscribed "nontherapeutic" abortion, 28 proscribed abortion altogether or permitted it only to preserve maternal or unborn life. Thus, based upon the Supreme Court's use of the term "therapeutic" in *Beal*, the Illinois legislature provides funding for "therapeutic" abortions and excludes only "nontherapeutic" abortions.

Of course, the Supreme Court's decision in *Roe v. Wade* did not alter the content, terms or intent of the Social Security Act. In fact, if any plaintiff had raised the claims presented here during 1972, the suit would have been dismissed as ludicrously frivolous. The intent of the enacting Congress never changes; it is a historical fact. Judicial revisionism of historical congressional intent is neither philosophically nor jurisprudentially justifiable. Therefore, this court's holding about what the Congress intended in 1965 should be no different in 1978 than it would have been in 1972. And, insofar as Congress has since perceived its obligations under this program of "co-operative federalism," it has acted to restrict funds to be allocated to the states under Title XIX in a manner which falls short of funding "medically necessary" abortions — further implying that Congress does not understand the Act to require the states to fund "medically necessary" abortion. Congressional funds for no other medical practice or procedure have been restricted in this manner.

Recent congressional debates have buttressed this interpretation. During the recent debates on congressional funding of abor-

tions, Rep. Henry Hyde, the original author of the Hyde Amendment, was asked by Rep. Bauman about the intent of his amendment:

Mr. Bauman: Mr. Chairman, I have asked the gentleman to yield only so I can get his comment as the author of the original Hyde amendment language.

As the gentleman knows, I refer to a number of Federal court cases that have been handed down in the last year, particularly one in Ohio, in which the courts interpreted the Hyde language to restrict the right of the States to pass anti-abortion language that is stricter in content than the Federal law.

I will ask the gentleman, was that in fact ever the intention of that language?

Mr. Hyde: Certainly not.

Mr. Bauman: In other words, it was, as I understood it, the intention of the language to permit States to enact legislation consistent with their own wishes, whether more or less restrictive, to govern the funding of abortions?

Mr. Hyde: Absolutely. It seems to me the Federal legislative process ought to control the Federal purse strings, and the State funds ought to be controlled by the State Legislatures.

For the courts to say that, when the Social Security Act was passed or this title was passed, in 1963 or 1965, and since in the preamble the words, "medically necessary," are found at a time when abortions were a crime in most of the States of this country at the time that this basic statute was passed, somehow or other that mandates the States to fund abortions, even though we in the Federal Government have said we will fund no abortions except to save the life of the mother, is ridiculous.

So, Mr. Chairman, this amendment offered by the gentleman from Maryland (Mr. Bauman) clarifies this issue and says we are not imposing on the States any mandate on the issue of

abortion. Cong. Rec. H11771 (daily ed. Dec. 11, 1979).

Congress, therefore, interpreted Title XIX to provide no limitations on the state's discretion to limit abortion funding. The intent of passage of the Hyde amendment was to limit federal funding of abortions, not require states to fund them.

III

The Appropriations Clause of the United States Constitution Prohibits the Judiciary from Ordering Payments for Abortions Beyond the Limitations Established by Congress.

The Constitution of the United States grants the exclusive authority to appropriate funds to the Congress via Article I, Section 9, Clause 7:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law...

The power to appropriate or make funds available for payment by the various agencies and departments of our government is not vested in the executive nor in the judicial arms of our government. It is therefore not within the realm of the judiciary to make available or to limit any funds. The U.S. District Court for the Southern District of California has made the following statement regarding the separation of these powers:

The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a plain invasion of the powers of said body conferred upon it by the Constitution of the United States.

Our judiciary has been exceedingly careful not to intrude upon the powers of the other two branches of the government

and has often recognized its limitations in this respect.

In the case of *Decatur v. Paulding*, 14 Pet. 497, 39 U.S. 497, 522, 10 L. Ed. 559, the court expressed itself as follows: "...To permit an interference of the courts of justice with the accounts and affairs of the treasury, would soon sap its very foundations; money would not be drawn out according to its own rules, nor could the secretary of the treasury ever inform congress of the amount needed. Congress would, of necessity, be compelled to consult the court, not the secretary, when making appropriations." *Spaulding v. Douglas Aircraft Co., Inc.*, 60 F. Supp. 985, 988 (S.D. Calif. 1945).

Furthermore, the *Spaulding* decision discusses the ability of Congress to restrict the expenditure of appropriated funds or to place certain conditions on the use of funds made available by its actions:

Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations. *Spaulding v. Douglas Aircraft Co., Inc.*, *supra*, 60 F. Supp. at 988.

The appropriation of funds and the designation of certain monies for particular purposes are powers granted to Congress in its capacity as representatives of the people. The policy regarding the use and availability of funds should be a direct reflection of the wants and desires of those who have elected their Senators and Congressmen. Policy decisions should not be made by the court.

(I)n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common-sense and the public weal." Our Constitution vests such responsibilities in the political Branches. *Tennessee Valley Authority v. Hill*, 98 S. Ct. 2279, 2302 (1978).

As an integral part of an appropriations measure, the Hyde

Amendment comes within the exclusive authority granted Congress to appropriate the public funds. The restrictions and conditions contained in the Hyde Amendment are as much a part of the appropriations to the Department of Health, Education and Welfare as the specific designations of the amounts of funds made available. Congress now must answer to the people as to whether these appropriations, with the accompanying restrictions and conditions, are what the voting public desires. If the measure is repugnant to the wishes of a particular representative's constituency, that representative may face the consequences at the next election.

On the other hand, if Congress is to answer to the judiciary in regard to appropriations, those policies desired by the voters may not be carried out. If this is the case, the power of appropriation no longer belongs exclusively to Congress and the authority which was intended to be vested in the legislative branch of our government would now be shared with the branch intended to enforce our laws.

Several suits have been brought in various federal courts testing the constitutionality of the Hyde Amendment. In the case of *Doe v. Matthews*, 420 F. Supp. 865 (D.N.J. 1976), Judge Biunno dealt with the separation of powers and appropriation by the judiciary. The Court was faced with the practical question of what happens if a portion of an appropriations measure is struck down as unconstitutional:

(N)one of the cases relied on deal with one obvious question raised by the challenge to the Hyde Amendment, namely, the impact of the provision in the United States Constitution, Article I, §9, cl. 7 that:

"No money shall be drawn from the Treasury but in consequence of appropriations made by law."

Neither the complaint, the moving papers nor the initial brief discusses this question. Yet it cannot be avoided, because, on the record before the Court, the Congress simply has not appropriated any monies for fiscal 1977 to reimburse Medicaid States with a federal share for elective abortions.

For this question, a declaratory judgment that the Hyde Amendment is unconstitutional or enjoining Secretary Mathews of HEW from enforcing it, or both (as asked by the complaint) would be a futile and meaningless judgment. This is because of the fact that if Secretary Mathews were to ignore the Hyde Amendment pursuant to such a judgment, the Secretary of the Treasury would remain bound to observe the Hyde Amendment and to refuse to draw any monies out of the Treasury for payment of a federal share to a Medicaid State on account of elective abortions...

Similarly, it has long been the law, as it must be in the light of the clear and explicit language of the constitution, that no officer may pay an obligation of the United States without an appropriation for that purpose, and no mandamus may issue to that end. *Reeside v. Walker*, 52 U.S. (11 How.) 623 (1850); *Collins v. United States*, 15 Ct. Cl. 22 (1879); *Contracts of Extension Capitol*, Op. Atty. Gen. 28 (1853).

Even if the Secretary of the Treasury were joined as an indispensable party for the remedy sought, a serious question arises whether any court can direct him to draw monies from the Treasury when there is no appropriation made by law. *Doe v. Matthews*, *supra*, F. Supp. at pp. 870-871.

Thus, even in the face of a binding obligation or in the case of funds unconstitutionally obtained, no court may order monies paid from the Treasury where Congress has not made an appropriation. *Reeside v. Walker*, *supra*; *Stitzel-Weller Distillery v. Wickard*, 118 F.2d 19 (1941); *Doe v. Matthews*, *supra*. See *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937); *Spaulding v. Douglas Aircraft Co., Inc.*, *supra*. Accord *California State Employees Association v. Flournoy*, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (1973), cert. denied, 414 U.S. 1093 (1974) (California law); *Starkweather v. Blair*, 245 Minn. 371, 71 N.W. 2d 869 (1955) (Minn. law); *Mallory v. Barrera*, 544 S.W. 2d 556 (Mo. 1976) (federal funds in state treasury); *Opinion of the Justices*, 381 A.2d 1204 (N.H. 1978) (New Hampshire law as applied to federal funds in state treasury); *Shapp v. Sloan*, 367 A.2d 791 (Pa. Cmwlth 1976) (Pennsylvania law regarding federal funds in state treasury). Cf. *Wheeler v. Barrera*,

417 U.S. 402 (1974) (federal law cannot compel a state to violate its constitution). The rule is a laudable one, for it lies at the heart of the concept of separation of powers deemed essential by Alexander Hamilton in *The Federalist*, No. 78.

For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments...A Hamilton, *The Federalist*, No. 78 (Wright ed. 1961) at 491 (footnote omitted).

Since the Hyde Amendment takes the form of a restriction on the expenditure of funds, some may argue that this provision is exempted from the exclusive authority of Congress. As early as 1888, however, this Court found that Congress has the right to place such restrictions as part of its appropriations power:

The absolute control of the monies of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people, and it is entirely within the power of Congress to indicate the class of persons who shall not be paid out the general appropriations, but shall come to Congress for relief. *Hart's Case*, 16 Ct. Cl., 484 (1880), *aff'd.*, 118 U.S. 62 (1888).

See also, *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977).

The judiciary is also restricted from considering the equities which may be involved in regard to whether it should rule on appropriations or budget authority:

(A)ny order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress. Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equi-

ties. *National Association of Regional Councils v. Costle*, 564 F.2d 583, 589 (D.C. Cir. 1977).

Based upon the separation of powers granting the exclusive authority for the appropriation of funds to Congress, any action taken in regard to the Hyde Amendment would amount to appropriation by the Judiciary.

The Court must bear in mind the possible results of any action striking down this appropriations act. If the entire act is considered invalid on a constitutional basis, no monies will be available for any abortions. This appropriation makes available the funds for abortions left unrestricted by the Hyde Amendment as well as restricting the use of funds for other abortions. Therefore, a finding that this act is unconstitutional will limit the availability of all funds and not make any funds available for "medically necessary" abortions, as the District Court ordered.

The District Court assumed that it could strike down only the Hyde Amendment portion of the Department of Health, Education and Welfare appropriations act. This action on the Hyde Amendment alone was, in essence, an appropriation by the District Court of monies for abortions presently categorized under the Hyde Amendment restrictions. Such an appropriation by the judiciary is strictly forbidden by our Constitution. See *Spaulding v. Douglas Aircraft*, *supra*, 60 F. Supp. at 988, where the Court found no justifiable controversy in a declaratory judgment action which requested that the Renegotiation Act be declared unconstitutional because, the Court ruled, Congress, in making appropriations, had power not only to designate the purpose of appropriation, but also conditions under which the executive department of our government could expend the appropriations.

The Hyde Amendment is a part and parcel of the appropriations act and cannot be read apart from the appropriation of the funds which it restricts. The District Court in *Doe v. Matthews*, *supra*, was reluctant to consider the Hyde Amendment apart from the rest of the act:

Whether the Hyde Amendment is a "rider" (a term usually

describing a provision of law unrelated or not germane to the bill to which it is attached) or a floor amendment, is by no means clear. In any event, whatever the legislative mechanism was, the challenged provision is claimed to have been passed by both Houses of Congress, sent to the President who vetoed the entire bill, and enacted into law by a two-thirds vote of both Houses of Congress. The Constitution of the United States does not require the Congress to limit each Bill to one object, or to state that object in its title. It does not extend to the President the authority to veto one item of an appropriations law, or to the Congress the authority to override the veto of one or more of such items. It does not authorize the mechanism of the conditional veto. A bill either becomes a law, as a whole, or it is no law at all. *Doe v. Matthews*, *supra*, 420 F. Supp. at 868.

Whether the Hyde Amendment is considered separately or as part of the appropriations act, this Court will be faced with a dilemma which it need not consider if the issue of funding is placed where it belongs: in the hands of Congress.

The wisdom of leaving the entire responsibility to the Congress for levying taxes and determining expenditures is the backbone of fiscal responsibility for this country. Congress will only appropriate money when it has determined that there will be sufficient income to make the appropriation. To allow the judiciary to increase the budget could result in economic chaos. It is for this very reason that the separation of the powers prevents the judiciary from increasing expenditures.

In a time when fiscal responsibility is paramount in the public's mind, the judiciary should not usurp the power of the legislature to set the balance of the income and expenditure. This is particularly true regarding abortion funding because of the strong division which exists in the country regarding its propriety. With the judiciary under increasing attack from all quarters, this question should be left to Congress.

CONCLUSION

The state is not required by the Constitution to attack every problem or not attack it at all. *Dandridge v. Williams, supra*. In addition, as long as a classification has some reasonable basis, it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1910). "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1912). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1960).

In the instant case, the interests of the state are advanced by the classifications created by this statute. Indeed, most of the conditions permitting restricted funding have been implicitly approved in *Maher, Beal* and *Poelker*. Even if this Court should agree, however, that the challenged regulation should not exist or should be less restrictive, that opinion should not prevent the upholding of this regulation because this Court should not strike down a law "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma, Inc., supra*, 348 U.S. at 488. Such decisions are best rendered in the political arena. This court should continue to heed, therefore, the following admonition made by the Court in *Maher v. Roe, supra*, 97 S. Ct. at 2385-2386.

...Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (Citation omitted.)

In conclusion, we emphasize that our decision today does

not proscribe government funding of non-therapeutic abortions. It is open to Congress to require provision of medicaid benefits for such abortions as a condition of state participation in the medicaid program. Also, under Title XIX as construed in *Beal v. Doe, supra*, Connecticut is free — through normal democratic processes — to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

Accordingly, Amicus Curiae respectfully urge this Honorable Court to reverse the decisions below.

Respectfully submitted,

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APPENDIX

"A PROSPECTIVE STUDY OF THE EFFECTS OF INDUCED ABORTION ON SUBSEQUENT REPRODUCTIVE FUNCTION"

**Summary of Progress September 1, 1975 - May 31, 1978
Contract No. NO1-MD-6-2802**

Preliminary analyses of first subsequent pregnancies among 20,306 women who had an induced abortion during the time period July 1, 1970 through June 30, 1971 and an equal number of matched control women who had a live birth during the same time period indicates that the two groups experienced different outcomes for selected pregnancy related variables.

Measures related to birthweight and length of gestation were calculated for single live births. The rates of occurrence of selected maternal conditions present during pregnancy were calculated for those pregnancies which resulted in a live birth. This base was chosen to avoid counting more than once women who had multiple deliveries. Congenital malformation rates and rates of complications of labor were calculated for total live births. All rates have been adjusted for maternal age at the time of the first subsequent pregnancy following the index event.

Preliminary findings based upon provisional data indicate:

1. The control group had 2.5 times as many live births at the first subsequent event following the index event as the study group.
2. The spontaneous fetal death ratio among the study group was nearly double that of the control group.
3. The rate of low birthweight live births (2500 grams or less) was higher among the study group.

4. The rate of early gestational age infants (28 weeks or less) was higher among the study group.
5. The rate of complications of labor was higher among the study group.
6. The rate of abnormal uterine bleeding, eclampsia and pre-eclampsia was higher among the study group.
7. There was essentially no difference in the rate of congenital malformations between the two groups.
8. The mean birthweight was lower for the study group.
9. There was no difference in the mean gestation length between the two groups.

Our preliminary findings are summarized in the following table.

FIRST SUBSEQUENT PREGNANCY AFTER INDEX EVENT
PROVISIONAL DATA

Characteristic	Study Group	Control Group
Number of Women	20,306	20,306
Number of Single Live Births	2,867	7,038
Number of Pregnancies Resulting in a Live Birth	2,899	7,102
Number of Total Live Births	2,930	7,162
Number of Total Spontaneous Fetal Deaths	256	338
Spontaneous Fetal Death Ratio (per 1,000 Total Live Births)	87.3	47.2
For Single Live Births, Rate of Low Birthweight Infants (2500 grams or less) adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	79.1	59.8
For Single Live Births, Rate of Early Gestation Infants (28 weeks or less) adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	10.0	6.0
For Total Live Births, Rate of Complications of Labor adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	94.7	51.7

(continued)

Characteristic	Study Group	Control Group
For Pregnancies Resulting in a Live Birth, Rate of Abnormal Uterine Bleeding, Eclampsia and Preeclampsia adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	20.5	13.9
For Total Live Births, Rate of Congenital Malformations adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	9.9	9.6
For Single Live Births, Mean Birthweight in Grams	3265.2	3346.9
For Single Live Births, Mean Gestation in Days	278.9	279.6

QUARTERLY REPORT MEDICAID FINANCED ABORTIONS UNDER P.L. 95-205 July 1, 1979 - September 30, 1979

A total of 1,535 Medicaid abortions with Federal Financial Participation were reported by 27 jurisdictions for the period July 1, 1979 through September 30, 1979 (Chart A). Twenty-six jurisdictions reported that no abortions meeting the criteria of P.L. 95-205 were financed during this period. The 1,535 abortions reported for this quarter are an increase over the 1,312 reported for the April-June 1979 Quarter. This increase is principally due to the increase in the number of abortions reported by Massachusetts. This State reported 671 abortions for the July-September 1979 Quarter in contrast to 211 abortions for the April-June 1979 Quarter.

Since the regulations for Federal financing of Medicaid abortions were issued on February 14, 1978, 6,180 abortions have been reported by 44 jurisdictions (Chart B). Nine jurisdictions (California, District of Columbia, Hawaii, Louisiana, Michigan, Minnesota, Montana, Puerto Rico, and Virgin Islands) have reported funding no abortions that meet the criteria of the legislation cited above.

Justifications were provided for 4,265 abortions of the 6,180 reported abortions. States do not always provide the reasons for abortions when submitting quarterly reports. The distribution

among the jurisdiction categories during the last five reporting periods has been reasonably consistent. The distribution of these categories over the five quarters is: 82 percent justified on the basis of danger to the life of the woman, 15 percent due to "severe and long lasting damage to her physical health," and three percent due to "rape or incest" (Chart C).

There is no reliable information available on the number of Medicaid abortions financed without Federal matching, nor on the number of Medicaid abortions paid for prior to February 14, 1978.

For more information on these data, please contact Richard Beisel, Medicaid Program Data Branch (301) 597-1417.

Office of Research, Demonstrations and Statistics
Health Care Financing Administration
November 14, 1979

CHART A
NUMBER OF REPORTED MEDICAID ABORTIONS, BY STATE AND JUSTIFICATION FOR
ABORTION, FINANCED WITH FEDERAL MATCHING FUNDS
P.L. 95-205, July 1, 1979 - September 30, 1979

STATE (2)	Total Number of Abortions Reported	JUSTIFICATION FOR ABORTION		
		Life of Woman Endangered	Severe and Long Lasting Damage to Health of Woman	Rape or Incest
Total	1,535	442	126	16
Alabama	23	10	13	0
Alaska	0	-	-	-
Arizona (2)	-	-	-	-
Arkansas	3	3	-	-
California	0	-	-	-
Colorado	46	45	1	-
Connecticut	135	135	-	-
Delaware	0	-	-	-
Dist. of Columbia	0	-	-	-
Florida	0	-	-	-
Georgia	5	1	4	0
Guam	0	-	-	-
Hawaii	0	-	-	-

(continued)

STATE (2)	Total Number of Abortions Reported	JUSTIFICATION FOR ABORTION		
		Life of Woman Endangered	Severe and Long Lasting Damage to Health of Woman	Rape or Incest
Idaho	0	-	-	-
Illinois (3)	24	20	4	0
Indiana	0	-	-	-
Iowa	8	7	-	1
Kansas	5	3	-	2
Kentucky	1	0	1	0
Louisiana	0	-	-	-
Maine	0	-	-	-
Maryland	36	13	23	-
Massachusetts (4)	671	N/A	N/A	N/A
Michigan	0	-	-	-
Minnesota (3)	0	-	-	-
Mississippi	1	-	1	-
Missouri	0	-	-	-
Montana	0	-	-	-
Nebraska	0	-	-	-
Nevada	0	-	-	-
New Hampshire	1	1	-	-
New Jersey	27	-	27	-
New Mexico	2	2	-	-
New York	98	58	39	1
North Carolina	4	1	3	-
North Dakota	0	-	-	-
Ohio (4)	280	N/A	N/A	N/A
Oklahoma	73	73	-	-
Oregon	17	2	3	12
Pennsylvania	29	29	-	-
Puerto Rico	0	-	-	-
Rhode Island	1	1	-	-
South Carolina	1	1	-	-
South Dakota	0	-	-	-
Tennessee	1	-	1	-
Texas	0	-	-	-
Utah	0	-	-	-
Vermont	3	-	3	-
Virgin Islands	0	-	-	-
Virginia	10	10	-	-
Washington	30	27	3	-
West Virginia	0	-	-	-
Wisconsin	0	-	-	-
Wyoming	0	-	-	-

(1) Data for this report are based on HCFA 64.96 forms submitted by the reporting States.

(2) Arizona has no Medicaid Program.

(continued)

(3) Illinois and Minnesota reported 378 and 2 abortions, respectively, but Region V auditors disallowed the claims by both States, and determined that the Illinois figure should be 24 abortions and the figure for Minnesota should be zero abortions.

(4) Massachusetts and Ohio did not report reasons for abortions in the July-September 1979 period.

N/A - Not Available.

CHART B

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS BY STATE AND REPORTING

Period, February 14, 1978 - September 30, 1979

STATE [1]	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 - Sept. 30, '79
Total	6,180	760	728	840	1,005	1,312	1,535
Alabama	69	8	8	7	10	13	23
Alaska	94	94	-	-	-	-	-
Arkansas	15	6	3	-	-	3	3
California (2)	-	-	-	-	-	-	-
Colorado	338	81	40	49	65	57	46
Connecticut	300	47	30	29	37	22	135
Delaware	1	-	-	-	-	1	-
Dist. of Columbia	-	-	-	-	-	-	-
Florida	18	10	2	1	3	2	-
Georgia	17	3	6	3	-	-	5
Guam	1	-	-	1	-	-	-
Hawaii	-	-	-	-	-	-	-
Idaho	22	7	8	5	1	1	-
Illinois (3)	343	124	81	59	33	22	24
Indiana	4	2	2	-	-	-	-
Iowa	13	-	-	4	-	1	8
Kansas	23	-	-	3	5	10	5
Kentucky	6	-	-	-	3	2	1
Louisiana	-	-	-	-	-	-	-
Maine	8	1	1	1	4	1	-
Maryland	258	40	50	42	52	38	36
Mass.	1,137	-	-	24	231	211	671
Michigan	-	-	-	-	-	-	-
Minnesota	-	-	-	-	-	-	-
Mississippi	13	12	-	-	-	-	1
Missouri	48	-	-	48	-	-	-
Montana	-	-	-	-	-	-	-
Nebraska	1	-	-	-	-	1	-
Nevada	2	-	-	-	-	2	-
New Hampshire	6	-	1	-	3	1	1
New Jersey	150	34	22	42	21	4	27
New Mexico	8	2	-	3	1	-	2

(continued)

STATE [1]	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 - Sept. 30, '79
New York	413	54	49	59	72	61	98
North Carolina	17	8	1	-	1	3	4
North Dakota	1	1	-	-	-	-	-
Ohio	1,659	38	327	386	272	296	280
Oklahoma	201	10	9	19	39	51	73
Oregon	86	7	2	22	19	19	17
Pennsylvania	696	34	53	21	115	444	29
Puerto Rico	-	-	-	-	-	-	-
Rhode Island	3	-	1	-	1	-	1
South Carolina	31	12	7	2	3	6	1
South Dakota	1	1	-	-	-	-	-
Tennessee	21	19	-	-	-	1	1
Texas	17	7	5	2	3	-	-
Utah	3	-	2	-	1	-	-
Vermont	16	-	3	3	5	2	3
Virgin Islands	-	-	-	-	-	-	-
Virginia	28	2	3	4	5	4	10
Washington	43	-	-	-	-	13	30
West Virginia	3	3	-	-	-	-	-
Wisconsin	45	33	11	1	-	-	-
Wyoming	1	-	1	-	-	-	-

(1) Arizona has no Medicaid Program

(2) California has reported abortions involving Federal Financial Participation (FFP) to the Health Care Finance Administration (HCFA). However, there were claims for abortions submitted on amended reports to the Region IX office. The Regional Office disallowed the claims and called for an audit. Should the audit find a significant number of these amended reports to be legally reimbursed under the Medicaid program, HCFA will reflect the data in future reports.

(3) The State of Illinois reported 1,013 abortions for the period from April 1, 1979 - June 30, 1979. After a review conducted by the Region V Medicaid Bureau, it was determined that only 22 met the criteria under P.L. 95-205 for Federal matching funds. Also, for the period July - September 1979, Illinois and Minnesota, reported 378 and 2 abortions, respectively, but Region V auditors disallowed the claims by both States, and determined that the Illinois figure should be 24 abortions and the figure for Minnesota should be zero abortions.

CHART C

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS, BY JUSTIFICATION FOR ABORTION

February 14, 1978 - September 30, 1979

Justification for Abortion	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 - Sept. 30, '79
Total No. of Reported Abortions	4,265 (1)	666	728	768	736	783	584

(continued)

Justification for Abortion	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 - Sept. 30, '79
Life of Woman Endangered	3,507	495	563	651	654	702	442
Severe & Long Lasting Damage to Health of Woman	650	147	153	92	68	64	126
Rape or Incest	108	24	12	25	14	17	16

(1) Figures will not add to totals of Chart B because Alaska did not report the reasons for abortions in the February - June 1978 period, Massachusetts and Missouri did not report the reasons for abortions in the October - December 1978 period, Massachusetts, Illinois and Vermont did not report the reason for abortions in the January - March 1979 period, Illinois, Massachusetts and Ohio did not report the reasons for abortions in the April-June 1979 period, also Massachusetts and Ohio did not report the reasons for abortions in the July-September period.

MAJOR REASON FOR SEEKING ABORTION GIVEN BY 400 PATIENTS

	Saline [%]	Curettage [%]
School	17.5	7.0
Career, personal freedom	11.5	7.5
Medical complications	4.5	10.0
Financial strain	19.5	15.0
Unmarried	9.0	8.5
Too young	6.0	11.0
Fear of social disgrace	5.0	1.5
Family already completed	3.5	13.5
Shakey relationship with man involved	8.0	9.0
Children too close in age	2.0	4.0
Possession of own children jeopardized	1.0	1.0
Parental advice	2.0	0.5
Never wants children	0.5	1.0
Not fit to be a mother	1.5	3.0
Unwilling intercourse	-	0.5
Plans to marry abandoned	0.5	-
Too early in marriage	-	2.0
Too old	-	1.5
Didn't want to hurt family	4.5	0.5
Other	3.5	3.0

Source: Kerenyi, et al, "Reason for Delayed Abortion: Results of 400 Interviews," 117 American Journal of Obstetrics and Gynecology, 299, 307 (1973).

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-4, 79-5, and 79-491

Supreme Court, U. S.
FILED
FEB 28 1980
MICHAEL RODAK, JR., CLERK

JASPER F. WILLIAMS and EUGENE G. DIAMOND, *Appellants*

—v.—

DAVID ZBARAZ *et al.*

JEFFREY C. MILLER, Acting Director,
Illinois Department of Public Aid, *Appellant*

—v.—

DAVID ZBARAZ *et al.*

UNITED STATES OF AMERICA, *Appellant*

—v.—

DAVID ZBARAZ *et al.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Brief of JANE ROE *et al.*; JOHN FRANKLIN, M.D. *et al.*;
and PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA,
ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S HEALTH SERVICES, and
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SUBJECT INDEX

	<u>Page</u>
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. THE COURT CAN DECIDE THIS CASE ON STATUTORY GROUNDS THROUGH THE APPLICATION OF WELL-SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION AND AVOID THE RESOLUTION OF SERIOUS CONSTITUTIONAL QUESTIONS	8
II. TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES FUNDING OF MEDICALLY NECESSARY ABORTIONS	16
III. THE HYDE AMENDMENT DOES NOT ALTER ILLINOIS' OBLIGATIONS UNDER TITLE XIX OF THE SOCIAL SECURITY ACT	31
A. The Unambiguous Language Of The Hyde Amendment Requires The Conclusion That Its Only Effect Is To Restrict The Disbursement Of Federal Funds	32
B. Established Precedent Creates A Strong Presumption Against Construing Appropriations Legislation To Make Substantive Changes in Existing Law	36

	<u>Page</u>
C. The Express Rule Of Both Houses Of Congress Bolster The Presumption Against Construing An Appropriations Measure To Alter Prior Substantive Legislation	42
D. The Legislative History Of The Hyde Amendment Does Not Demonstrate An Intention To Repeal Existing State Obligations Under The Social Security Act	49
E. The Presumption Against An Expansive Implied Construction Of An Appropriations Statute Is Justified By Basic Principles Of The Separation Of Powers	52
F. The Interpretative Regulations Of The Department Of Health, Education And Welfare — The Federal Agency Charged With Administration Of The Hyde Amendment — Do Not Construe The Amendment To Repeal Title XIX Obligations	56
IV. VIEWED PURELY AS A FEDERAL APPROPRIATIONS MEASURE THE HYDE AMENDMENT DOES NOT ALTER ILLINOIS' OBLIGATIONS UNDER TITLE XIX OF THE SOCIAL SECURITY ACT	60
V. CONCLUSION	66

<u>TABLE OF AUTHORITIES</u>	
	<u>Page</u>
<u>CASES:</u>	
<u>Ashwander v. T.V.A.</u> , 297 U.S. 288, 346-48 (1936)	12
<u>Beal v. Doe</u> , 432 U.S. 438 (1977)	11, 21
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601, 613 (1973)	12
<u>Buckley v. McRae</u> , appeal dismissed, 433 U.S. 916 (1977)	48
<u>Budnicki v. Beal</u> , 450 F. Supp. 546 (E.D. Pa., 1978)	28
<u>Chrysler Corp. v. Brown</u> , ____ U.S. ____, 99 S.Ct. 1705, 1714 (1979)	19
<u>Colautti v. Franklin</u> , 439 U.S. 379 (1978) ...	29
<u>Cole v. Harris</u> , 571 F.2d 590, 597 (D.C. Cir. 1977)	34
<u>Crowell v. Benson</u> , 285 U.S. 22, 62 (1932) ...	12
<u>Curtis v. Page</u> , C.A. No. 78-073 (N.D. Fla., April 18, 1979)	28
<u>D. R. v. Mitchell</u> , 456 F. Supp. 609 (D. Utah 1978)	24, 25
<u>Dandridge v. Williams</u> , 397 U.S. 471 (1970) ..	14, 62

	<u>Page</u>
<u>Dodson v. Parham</u> , 427 F. Supp. 97 (N.D. Ga. 1977)	26
<u>Doe v. Bolton</u> , 410 U.S. 179, 192 (1973)	21
<u>Doe v. Busbee</u> , 471 F. Supp. 1326, 1333 (N.D. Ga. 1979)	7, 23, 64
<u>Doe v. Kenley</u> , 584 F.2d 1362 (4th Cir. 1978)	5, 22
<u>Doe v. Matthews</u> , 420 F. Supp. 865 (D.N.J. 1976)	64
<u>Doe v. Matthews</u> , 422 F. Supp. 141, 143 (D.D.C. 1976)	64
<u>Doe v. State</u> , _____ Minn. _____ 257 N.W.2d 816 (1977)	27
<u>Edelman v. Jordan</u> , 415 U.S. 651, 675 (1974)	15
<u>Emma G. v. Edwards</u> , 434 F. Supp. 1048 (E.D. La., 1977)	23
<u>Fabula v. Buck</u> , 47 U.S.L.W. 2789 (4th Cir., May 21, 1979)	28
<u>Freiman v. Walsh</u> , No. 77-4161-CV-C (W.D. Mo., Jan. 26, 1979)	23
<u>Gibney v. U.S.</u> , 114 Ct. Cl. 38 (1949)..	38
<u>Glover Construction Co. v. Andrus</u> , 451 F. Supp. 1102 (E.D. Okla. 1978)	34
<u>Griggs v. Duke Power Co.</u> , 401 U.S. 433 (1970)	56

	<u>Page</u>
<u>Hagans v. Lavine</u> , 415 U.S. 528, 549 (1973)	14
<u>Hodgson v. Board of County Commisioners</u> No. 79-1665 (8th Cir. Jan. 9, 1980)...	4, 6, 22, 31, 41, 42, 54, 55
<u>King v. Smith</u> , 392 U.S. 309, 312 n.3 (1968)	15
<u>Langston v. United States</u> , 118 U.S. 389 (1886)	5, 37, 38
<u>Leroy v. Great Western United Corp.</u> , 99 S.Ct. 2710, 2720-21 (1979)	15
<u>Lewis v. Shulimson</u> , 400 F. Supp. 807 (E.D. Mo. 1975)	62
<u>Lorillard v. Pons</u> , 434 U.S. 575, 577 (1978)	12
<u>Maher v. Roe</u> , 432 U.S. 464 (1977)	11
<u>McRae v. Califano</u> , 76C 1804 (S.D.N.Y. Jan. 15, 1980)	10, 31
<u>Morton v. Mancari</u> , 417 U.S. 535, 550 (1974)	37
<u>N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen Local 760</u> , 377 U.S. 58, 66 (1964)	48
<u>N.L.R.B. v. Thompson Products, Inc.</u> , 141 F.2d 794 (1944)	38

	<u>Page</u>
<u>New York Airways v. U.S.</u> , 369 F.2d 743 (Ct. Cl. 1966)	38
<u>PWRO v. Shapp</u> , C. A. 78-2353 (3d Cir. July 9, 1979)	26
<u>Phillips v. Martin Marietta Corp.</u> , 400 U.S. 542 (1970)	56
<u>Pinneke v. Preisser</u> , 47 U.S.L.W. 2790 (N.D. Iowa, May 11, 1979)	27, 28
<u>Planned Parenthood Affiliates of Ohio v. Rhodes</u> , 477 F. Supp. 529 (S.D. Ohio 1979)	23, 40, 48, 53, 64, 65
<u>Poelker v. Doe</u> , 432 U.S. 519 (1977)	11
<u>Power Reactor Co. v. Electricians</u> , 367 U.S. 396, 408 (1961)	57
<u>Preterm v. Dukakis</u> , 591 F.2d 121 (1st Cir. 1979), cert. denied, U.S. ___, 99 S.Ct. 1281 (1979)	4, 5, 10, 20, 21, 24, 31, 42, 46, 51
<u>Quern v. Mandley</u> , 436 U.S. 725 (1978)	28
<u>Reproductive Health Services v. Freeman</u> , ___ F.2d ___ (8th Cir. 1980) (Nos. 79-1275 and 79-1346)	10, 23, 25

	<u>Page</u>
<u>Right to Choose v. Byrne</u> , 398 A.2d 587 (N.J. Super. Ct. Ch. Div. 1979)	23, 24
<u>Roe v. Casey</u> , 464 F. Supp. 487 (E.D. Pa. 1978)	1, 2, 23
<u>Rush v. Parham</u> , 440 F. Supp. 383 (D, Ga. 1977)	26
<u>Schwegmann Bros. v. Calvert Distilling Corp.</u> , 341 U.S. 384 (1951)	48
<u>Smith v. Ginsberg</u> , No. 75-0380 CH (S.D. W. Va., May 9, 1978)	23
<u>TVA v. Hill</u> , 437 U.S. 153 (1978) ..	5, 6, 15, 38, 39, 45, 52, 54
<u>Taylor v. Kjaer</u> , 171 F.2d 343 (D.C. Cir. 1948)	38
<u>Udall v. Tallman</u> , 380 U.S. 1 (1965)	56
<u>United States v. City of Chicago</u> , 400 U.S. 8 (1970)	56
<u>United States v. Missouri Pacific Railroad</u> , 278 U.S. 269, 277-278 (1929)	34
<u>United States v. Mitchell</u> , 109 U.S. 46 (1883)	5, 36, 37

	<u>Page</u>
<u>United States v. Oates</u> , 560 F.2d 45, 71, n. 27, (2d Cir. 1977)	47
<u>United States v. Thirty-Seven Photographs</u> , 402 U.S. 363, 369 (1971)	12
<u>United States v. United States Steel Corp.</u> , 482 F.2d 439, 441 (7th Cir. 1973)	34
<u>United States v. Vulte</u> , 233 U.S. 509 (1914)	38
<u>Vargas v. Trainor</u> , 508 F.2d 485 (7th Cir. 1974)	62
<u>White v. Beal</u> , 555 F.2d 1146, 1150 (3d Cir. 1977)	25, 26
<u>Zbaraz v. Quern</u> , 596 F.2d 196, 199 (7th Cir. 1979)	8, 10, 31, 42 44
<u>Zbaraz v. Quern</u> , 496 F. Supp. 1212 (W.D. Ill. 1979)	10, 20

U. S. CONSTITUTION

U. S. Constitution, First Amendment	11
U. S. Constitution, 14th Amendment..	11, 14

	<u>Page</u>
<u>FEDERAL STATUTES:</u>	
Hyde Amendment.....	Passim
91 Stat. 1420 (1978)	16, 18
92 Stat. 1586 (1979)	17, 25
93 Stat. 925, 926 (1980)	63
Title XIX Social Security Act	
42 U.S.C. 1396 <u>et seq.</u>	Passim
42 U.S.C. 1396 (a)(10)	17, 18
42 U.S.C. 1396 (a)(17)	17, 25
42 U.S.C. 1396a(a)(2)	63
42 U.S.C. 1396a(a)(10)(C)	17, 18
42 U.S.C. 1396a(a)(18).....	63
42 U.S.C. 1396a(a)(13)(C)	17
42 U.S.C. 1396a(a)(19)	18
42 U.S.C. 1396a(c)	63
42 U.S.C. 1396d(b)	63
42 U.S.C. 1396g(g)	63
42 U.S.C. 1302c (1)	29
42 U.S.C. 1381 <u>et seq.</u>	62
HEW Regulations	
42 C.F.R. § 50.301-50.310	6, 58, 59
42 C.F.R. § 50.304	6
42 C.F.R. § 50.305.....	6
42 C.F.R. § 50.306	6
42 C.F.R. § 50.307	6
42 C.F.R. § 50.308	6
42 C.F.R. § 440.230	4, 17, 18, 57
43 C.F.R. § 31875	6, 58, 59
43 C.F.R. § 31868	6, 58, 59
43 C.F.R. § 4833	46, 56, 58
45 C.F.R. § 206.10(a)(1)	18, 25
45 C.F.R. § 249.10(b)(12)(i)	26

Page

STATE STATUTES:

Illinois PA 80-1091 Rev. Stat.
Ch 23 §5-5, 6-1, 7-1
(Supp. 1979) 8, 13, 15, 19,
20, 23

Pennsylvania Medical Assistance
Program 62 P.S. § 441.1 et. seq... 1, 2

Pennsylvania Public Act 16A,
(1978) 1, 2

Pennsylvania Public Act 148,
(1978)..... 1

OTHER AUTHORITIES:

House Rule XXI(2)..... 5, 43

Senate Rule 16.4 5, 43

Congressional Record

Vol. 122 H 10314 45
Vol. 123 S 11035 44
Vol. 123 H 6083 44, 45
Vol. 123 H 6086 6, 50, 51
Vol. 123 H 6090 6, 50
Vol. 123 H 10830 6, 50

S. Rep. No. 404 89th Cong. 1st
Sess. 77, 79, 81 17

H. R. Rep. No. 215 89th Cong. 1st
Sess. 67, 69, 71 17

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-4, 79-5, and 79-491

JASPER F. WILLIAMS and EUGENE G. DIAMOND, *Appellants*

—v.—

DAVID ZBARAZ *et al.*

JEFFREY C. MILLER, Acting Director,
Illinois Department of Public Aid, *Appellant*

—v.—

DAVID ZBARAZ *et al.*

UNITED STATES OF AMERICA, *Appellant*

—v.—

DAVID ZBARAZ *et al.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

**Brief of JANE ROE *et al.*; JOHN FRANKLIN, M.D. *et al.*;
and PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA,
ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S HEALTH SERVICES, and
PHILADELPHIA WELFARE RIGHTS ORGANIZATION,
Pennsylvania not-for-profit corporations, as *AMICI CURIAE***

INTEREST OF THE AMICI CURIAE

This brief of plaintiffs in Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) as Amici Curiae in support of the appellees is submitted with the written consent of all the parties. The consents have been filed with the Clerk of the Court.

Plaintiffs in Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) include the class of all pregnant or potentially pregnant women who are eligible for medical assistance under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 et seq., for whom abortions are medically necessary, although not necessary to save their lives, and who have been or will be prevented or impeded in obtaining therapeutic abortions because of Public Acts 16A and 148 of 1978.

In addition, plaintiffs include the class of all licensed physicians in Pennsylvania who are entitled to obtain reimbursement for necessary medical services

rendered to, and to perform medically necessary abortions for, persons eligible for medical services under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 et seq., and who would be denied reimbursement because of the enactment of Acts 16A and 148. Plaintiffs also include health care providers, who would be denied reimbursement for medically necessary abortions because of Acts 16A and 148.

The interest of the plaintiffs in Roe v. Casey, arises from the fact that they are parties to a case presently pending in the Court of Appeals for the Third Circuit, regarding reimbursement for medically necessary abortions.

The brief which Amicus curiae is requesting permission to file will contain a more complete argument on the statutory interpretation of "Medicaid" and whether or not the Hyde Amendment is a substantive amendment to the "Medicaid" statute. If

the argument is accepted, it would be dispositive of this case.

SUMMARY OF ARGUMENT

Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq., requires states which participate in the Medicaid program to reimburse certain medical services performed on eligible recipients. HEW regulations implementing the Medicaid program prohibit states from "arbitrarily deny[ing] or reduc[ing] the amount, duration or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness or condition." 42 C.F.R. §440.230 (1979). State laws, such as the Illinois law at issue in the present case, which attempt to deny funding for abortions except when the abortion is necessary to save the pregnant woman's life, violate that regulation by arbitrarily discriminating against medically necessary abortions solely upon the basis of the diagnosis, type of illness or condition involved. Hodgson v. Board of County Commissioners, No. 79-1665 (8th Cir. Jan. 9, 1980); Preterm v.

Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied, ___ U.S. ___, 99 S. Ct. 2181 (1979); Doe v. Kenley, 584 F.2d 1362 (1978).

The federal appropriations measure commonly known as the Hyde Amendment had no effect upon the states' Title XIX obligations. As the Hyde Amendment itself states, the provision merely restricted the disbursement of federal funds for abortions. Absent a clear statement of congressional intention to the contrary - which is not found in the Hyde Amendment - this Court has repeatedly held that appropriations riders must be construed to avoid substantive results. United States v. Mitchell, 109 U.S. 46 (1883); Langston v. United States, 118 U.S. 389 (1886); TVA v. Hill, 437 U.S. 153 (1978).

Congressional rules similarly prohibit changes in substantive law by means of an appropriations rider. Senate Rule 16.4; House Rule XXI(2). While those Rules may be deliberately waived in particular circumstances, no waiver occurred in connection

with the passage of the Hyde Amendment.

The legislative history of the Hyde Amendment also supports the conclusion that Congress did not alter the states' obligations to fund all medically necessary abortions. See, e.g., Congressman's Hyde's summation of his position at 123 Cong. Rec. H10830 (daily edit., Oct. 12, 1977); and remarks by Congressmen Edwards and Dornan at 123 Cong. Rec. H6090 and H6086, respectively.

Since Congress has left the states' Title XIX obligations intact, it is not proper for the courts to change those obligations. See, e.g., TVA v. Hill, supra, 437 U.S. at 191 and Justice McManus' opinion in Hodgson v. Board of County Commissioners, supra, slip opin. at 27, 28 (dissenting).

HEW regulations interpreting the Hyde Amendment buttress the conclusion that the Amendment affected only funding. 42 C.F.R. §§ 50.304, 50.305, 50.306, 50.307, 50.308. Whether or not the states are required to fund abortions is a "separate question" [43 Fed. Reg. 31875, July 21, 1978], to be resolved in light of the substantive

provisions of Title XIX and its implementing regulations.

The cut-off of federal funds for abortions except in certain narrowly-prescribed situations does not, of course, automatically relieve states from their obligation to fund services mandated by the Medicaid statute. While Medicaid is a program of cooperative federalism, federal financial participation in every service necessarily provided by a participating state is not required. Doe v. Busbee, 471 F. Supp. 1326, 1333 (N.S. Ga. 1979). Federal financial participation in Medicaid is computed as a percentage of the total state expenditure, and not on an item for item basis. 42 U.S.C. § 1396d(b).

ARGUMENT

I. THE COURT CAN DECIDE THIS CASE ON STATUTORY GROUNDS THROUGH THE APPLICATION OF WELL-SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION AND AVOID THE RESOLUTION OF SERIOUS CONSTITUTIONAL QUESTIONS

We urge the Court to resolve this case on statutory grounds, thereby making it unnecessary to reach the difficult constitutional questions which the case presents. We contend that the Illinois statute at issue here, which severely restricts Medicaid funding for medically necessary (therapeutic) abortions, conflicts with the overriding provisions of Title XIX of the Social Security Act [hereinafter cited as "Title XIX" or (1) "Medicaid"]⁽¹⁾. Therefore, the Illinois statute is invalid

(1)

Illinois P.A. 80-1091 limits abortion funding to procedures "necessary for the preservation of the life of the woman seeking such treatment" Ill. Rev. Stat. ch. 23 § 5-5, 6-1, 7-1 (Supp. 1979). The court of appeals held that Illinois is required to fund all Medicaid abortions for which federal matching funds are available. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979). This holding constitutes a judicial redrafting of the Illinois statute to track the language of the Hyde Amendment. The propriety of that judicial decision is irrelevant to our position. Because we contend that Illinois is obliged by Title XIX to fund all medically necessary abortions, both the version of the Illinois statute enacted by the Illinois legislature and the version created by the court of appeals impermissibly restrict Medicaid funding for abortions.

under the Supremacy Clause of the Constitution which provides that when state law conflicts with federal law, the federal law prevails.

Part of this brief explains why we ask the Court to accept the constructions of Title XIX and the Hyde Amendment which are discussed in Parts II-IV. The statutory constructions we advocate are supported by fundamental principles of statutory construction and would allow the Court to avoid the difficult constitutional questions with which it would otherwise be confronted. Part II of the brief discusses the provisions of Title XIX which oblige the states participating in Medicaid to pay for medically necessary abortions. We contend in Parts III and IV that the federal appropriations legislation known as the Hyde

(2)

The Hyde Amendment was attached as a rider to the annual HEW appropriations legislation for the last 4 years. The version of the Hyde Amendment most applicable to this litigation provided that appropriated federal funds may be used to perform abortions in only three situations: (1) where the life of the pregnant woman is endangered, (2) where the woman is a victim of rape or incest, or (3) where childbirth would cause severe and long-lasting physical health damage to the woman. 91 Stat. 1460 (1977) and 92 Stat. 1586 (1978).

Amendment did not alter the states' duty to fund therapeutic abortions under Medicaid. Thus, the Illinois statute which engendered this litigation is pre-empted by federal law and invalid under the Supremacy Clause.

The court of appeals in this case held that the Hyde Amendment impliedly repealed state obligations under Title XIX to fund Medicaid abortions and remanded the case to the district court to consider the constitutionality of the Hyde Amendment. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979). The district court held that the Hyde Amendment, construed as a substantive alteration of Title XIX, was unconstitutional. Zbaraz v. Quern, 496 F. Supp. 1212 (W.D. Ill. 1979). Recently, another district court reached the same conclusion in McRae v. Califano, 76 C 1804 (S.D.N.Y., Jan. 15, 1980). See also, Reproductive Health Services v. Freeman, ____ F.2d ____ (8th Cir. 1980) (Nos. 79-1275 and 79-1346), (state anti-abortion subsidy statute interpreted to parallel Hyde Amendment ruled unconstitutional); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979) cert. denied 99 S.Ct. 2181 (1979) remanded to district court to determine the constitutionality of

state statute construed to parallel Hyde Amendment).

The present case and the other cases cited above raise substantial and difficult constitutional issues — issues that are neither addressed nor settled by this Court's existing abortion funding decisions in Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); and Poelker v. Doe, 432 U.S. 519 (1977). If the Hyde Amendment is read to repeal state obligations under Title XIX, this Court will have to address the merits of difficult constitutional questions under the fundamental rights and rationality branches of the Equal Protection Clause, as well as issues under the First Amendment. We advocate a narrow construction of the effect of the Hyde Amendment, a construction which would avoid the constitutional issues in this case.

When two or more interpretations of a federal statute are fairly available, due regard for the proper role of the federal courts in our constitutional system demands the adoption of the statutory

interpretation which will avoid serious constitutional questions. Thus, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Lorillard v. Pons, 434 U.S. 575, 577 (1978) and United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971), both quoting Crowell v. Benson, 285 U.S. 22, 62 (1932). See also, Justice Brandeis' well-known formulation in his concurring opinion in Ashwander v. T.V.A., 297 U.S. 288, 346-48 (1936). And, more recently, see, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

As we will demonstrate in Part III, a construction of the Hyde Amendment that will avoid serious constitutional questions is more than "fairly possible". Such an interpretation is indeed required by the plain language of the statute,

by long-standing doctrines regarding the construction of federal appropriations legislation, by the explicit rules of both Houses of Congress, by a fair reading of the entire legislative history, and by the authoritative interpretative regulations of the federal agency charged with administering the Amendment. It would be difficult to imagine a more compelling case for application of the fundamental interpretative doctrine that difficult constitutional questions should not be confronted unnecessarily.

If the Hyde Amendment is construed as a withdrawal of federal funding which does not effect the existing obligations of the states participating in Medicaid to fund therapeutic abortions, the Court can decide the present case on the grounds that Illinois P.A. 80-1091 is inconsistent with Title XIX and therefore invalid under the Supremacy Clause of the Constitution. Although technically "constitutional," a claim

that a state statute or regulation is pre-empted by federal law is treated as a statutory ground for purposes of avoiding unnecessary resolution of constitutional questions. In Hagans v. Lavine, this Court explained:

[W]here . . . the pendent claim, although denominated "statutory," is in reality a constitutional claim arising under the Supremacy Clause, . . . the Court has characteristically dealt with the "statutory" claim first "because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues.

415 U.S. 528, 549 (1973).

Illustrative of this approach is Dandridge v. Williams, 397 U.S. 471 (1970) in which a state regulation was challenged on two grounds, because it conflicted with a federal statute and because it violated the Fourteenth Amendment's guarantee of equal protection. The Court began its analysis with the statutory (Supremacy Clause) issue "because if the appellee's position on this question is correct, there is no occasion to reach

(3)
the constitutional issues." Id. at 476. We urge a similar course upon the Court in this case. The remainder of this brief will demonstrate why the Court should apply settled principles of statutory construction recently affirmed in T.V.A. v. Hill, 437 U.S. 153 (1978), construe the Hyde Amendment as legislation affecting only the expenditure of federal funds, and hold that Illinois P.A. 80-1091 is inconsistent with Title XIX of the Social Security Act.

(3)
See also, Leroy v. Great Western United Corp., 99 S.Ct. 2710, 2720-21 (1979) (White, J., dissenting) Edelman v. Jordan, 415 U.S. 651, 675 (1974); King v. Smith, 392 U.S. 309, 312 n. 3 (1968).

II. TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES FUNDING OF MEDICALLY NECESSARY ABORTIONS

Title XIX of the Social Security Act was enacted in 1965 to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. § 1396 (emphasis added). Medicaid is a program of cooperative federalism. If a state chooses to participate, to be eligible for federal reimbursement, it must comply with the minimum requirements of state Medicaid programs set by federal law. Title XIX requires that a qualifying state plan must reimburse certain medical services to those who are eligible for welfare under the federal categorical assistance program (the "categorically needy"). 42 U.S.C. § 1396(a)(10). These services include: "inpatient hospital services, outpatient hospital services, other laboratory and X-ray services . . . and physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere." 42 U.S.C.

§§ 1396a(a)(13)(c), 1396(d). Standard abortion procedures necessarily involve most, if not all, of these types or classes of service mandated by Medicaid.

States may, at their discretion, enlarge the scope of their programs and provide Medicaid to poor people whose incomes are too high provided they satisfy the other requirements for categorical federal assistance (the "medically needy"). 42 U.S.C. § 1396a(a)(10)(c). Of course, each state must develop "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]." 42 U.S.C. § 1396(a)(17).

(4)

The legislative history of Title XIX indicates that the "reasonable standards" language was intended to allow the states some flexibility in determining the coverage of their plans with respect to optional recipients of medical assistance. See S. Rep. No. 404, 89th Cong., 1st Sess. 77, 79, 81 (1965); H. R. Rep. No. 213, 89th Cong. 1st Sess. 67, 69, 71 (1965). Because the purpose of the Act is to provide "necessary medical services" (42 U.S.C. § 1306), HEW has allowed the states to place reasonable limitations on the "extent" of coverage (e.g., the number of days inpatient hospital services) but the Act as interpreted does not authorize the states to eliminate coverage of a particular kind of medically necessary care. 42 C.F.R. 440.230; Beal v. Doe, 432 U.S. 438 (1977).

One such objective is that the provision of services must be in the "best interests of the recipients."

42 U.S.C. § 1396a(a)(19); 45 C.F.R. § 206.10(a)(11) (1978).

The constraints imposed on the states participating in Medicaid are explained further in 42 U.S.C. § 1396a(a)(10) which requires that the services available to any categorically needy recipient "shall not be less in amount, duration, or scope than the medical assistance made available to any other such recipient. . . ." General HEW regulations provide a more precise interpretation of § 1396a(a)(10). The regulations impose on state plans the following requirements (42 C.F.R. § 440.230 (1979)):

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures. (emphasis added)(5)

This bar against exclusion from Medicaid coverage based on "diagnosis, type of illness or condition" is fundamental to the Medicaid program and to the litigation at hand.

Against this federal statutory and regulatory framework, Illinois adopted P.A. 80-1091 which limits abortion funding to procedures "necessary

(5)

The regulations cited here have been promulgated by HEW, the agency charged with implementation of the provisions of Title XIX. Their validity is unchallenged and they must be presumed to have the "force and effect of law." Chrysler Corp. v. Brown, ___ U.S. ___, 99 S.Ct. 1705, 1714 (1979).

for the preservation of the life of the woman seeking such treatment" Ill. Rev. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1979). The United States Court of Appeals for the Seventh Circuit held that the Illinois statute, standing by itself, was invalid under Title XIX. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979); on remand, 496 F. Supp. 1212 (N.D. Ill. 1979) (appeal pending sub nom. Zbaraz v. Miller). The Seventh Circuit explained that "limiting Medicaid assistance to life-threatening abortions 'violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion.'" 596 F.2d at 199 (quoting from Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979)). Were it not for the Hyde Amendment which the court of appeals held amended the provisions of Title XIX, "the states would be obligated to provide for medically necessary abortions for which federal funds would not be available." Id. See Part III, infra, for discussion

of Hyde Amendment.

Three other circuit courts have unanimously found
(6)
similar state enactments to violate Title XIX.

As the First Circuit stated:

When a state singles out one particular medical condition - here, a medically complicated pregnancy . . . it has, we believe, crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition.

Preterm v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979),
cert. denied, 99 S.Ct. 2181 (1979). Most recently, the
Eighth Circuit explained that:

(5)

These rulings echo the warnings of the U.S. Supreme Court in Beal v. Doe, 432 U.S. 436 (1977), which upheld Pennsylvania's exclusion of non-therapeutic abortions from its medicaid program. Pointing to the definition of a "necessary" abortion set out in Doe v. Bolton, 410 U.S. 179, 192 (1973) (necessary in light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient) the Court cautioned that "serious statutory questions might be presented if a state medical plan excluded necessary medical treatment from its coverage." 432 U.S. at 444-45 and n. 3.

[T]he basic criterion is the financially eligible recipient's degree of medical need. The infirmity of the Minnesota scheme is that it subsidizes health-sustaining services generally, including pregnancy-related services, but subsidizes abortions only if they are life-sustaining. This policy denies service solely on the basis of diagnosis or condition, and does so arbitrarily because the denial is not in accordance with a uniform standard of medical need.

Hodgson v. Board of County Commissioners, No. 79-1665
(6)

slip op. at 10 (8th Cir. 1979). The Fourth Circuit has also affirmed that medically necessary abortions must be included in state medical assistance plans. Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978).

(6)

The Eighth Circuit noted that the states may have some discretion under Title XIX -- for financial reasons -- to determine the scope of services they will provide within the broad category of "medically necessary" services. The scope, however, must accord with the objectives of Title XIX including the provision of medical services on an even-handed basis and in the eligible recipient's best interests. See Hodgson, slip op. at 12.

District courts and state courts have virtually unanimously joined the circuits in enjoining funding restrictions similar to Illinois P.A. 80-1091. In Roe v. Casey, the district court held that the Pennsylvania statutes which limit abortion funding to life-saving situations "arbitrarily discriminate against medically necessary abortions on the basis of the diagnosis, type of illness or condition involved, in violation of the objective and requirements of Title XIX and its implementing regulations." 464 F. Supp. 487, 500 (E.D. Pa. 1978) (appeal pending). See also, Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Freiman v. Walsh, No. 77-4161-CV-C (W.D. Mo., Jan. 26, 1979), aff'd sub nom. in relevant part, Reproductive Health Services v. Freeman, ___ F.2d ___ (8th Cir. 1979) (Nos. 79-1275, 79-1346); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977); Smith v. Ginsberg, No. 75-0380 CH

(S.D. W. Va. May 9, 1978); Right to Choose v. Byrne, 398 A.2d 557 (N.J. Super. Ct. Ch. Div. 1979).

Only one federal court has approved a state effort to deny Medicaid payments for all but life-saving abortions. D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978). D.R. v. Mitchell, relying on anti-abortion statutes which were ruled unconstitutional eight years after the enactment of Title XIX, holds that "medically necessary" abortions are those which were legal when Title XIX was first enacted. Such static analysis contradicts the Medicaid statute, its legislative history and its regulations and has been accorded little respect in subsequent cases. As the First Circuit recognized, the Utah decision is unsupportable:

[D.R. v. Mitchell] gives only cursory analysis to the statutory claims and nowhere directly addresses the meaning of the accompanying HEW regulations. Therefore, defendant's reliance on that case is misplaced.

Preterm v. Dukakis, Civ. Action #78-1673 (D.Mass. July 28, 1978), slip op. at 11; aff'd, 591 F.2d 121 (1st

Cir. 1979). Likewise, the Eighth Circuit noted that the analysis in D.R. v. Mitchell "leads to the absurd result that Title XIX permits a participating state to withhold subsidies for any service, no matter how medically necessary, that was not legally available in 1965. [This] would contravene Title XIX's express directive that standards governing the extent of medical assistance be reasonable. Reproductive Health Services v. Freeman, slip op. at 9 (8th Cir. 1980) (citing 42 U.S.C. § 1396a)(a)(17)).

Title XIX requires compliance with the prohibition against discrimination based on illness, diagnosis or condition. Outside the abortion context, this "non-discrimination" principle has been widely upheld by courts faced with state restrictions on Medicaid services. In White v. Beal, the Third Circuit held that 42 U.S.C. § 1396a(a)(17) and 1396(a)(10) of Title XIX require that the financial pressures upon a state be met with "an equitable distribution of the total funds available among all in need of the service."

555 F.2d 1146, 1150 (3d Cir. 1977) (impermissible to only subsidize eyeglasses when poor vision is result of eye disease). See also, PWRO v. Shapp, C.A. 78-2353 (3d. Cir. July 9, 1979) (medically necessary orthodontic care required under Title XIX). Similarly in Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977), a federal district court invalidated a plan to limit reimbursement for drugs to those specified in a drug formulary and those additional drugs for which a physician obtained prior approval. The court found that even though 90% of the drugs needed would be covered, not all Medicaid beneficiaries would receive "the scope and quality of services necessary to achieve the prescription drug component's purpose of curing, mitigating or preventing disease or for the maintenance of health as required by 45 C.F.R. § 249.10(b)(12)(i)." Id. at 108.

In Rush v. Parham, 440 F. Supp. 383 (D. Ga. 1977), the district court held that federal law prohibited the state from denying reimbursement for necessary

transsexual surgery on the basis of diagnosis. The Minnesota Supreme Court reached the same result.

Doe v. State, ____ Minn. ____, 257 N.W. 2d 816 (1977).

An Iowa district court which ordered that state to provide reimbursement for transsexual surgery which was certified by a physician as medically necessary explained that:

The statutory mandate of the Title XIX Medicaid Program leaves no discretion to participating states in the provision of medically necessary services. In any program of cooperative federalism, states which choose to participate in the program must comply with certain statutory requirements as a condition to this participation and to federal financial assistance. Once the determination is made that an applicant requires necessary medical treatment, a person eligible for Title XIX assistance cannot be denied coverage by a state plan. Medical necessity is to be determined with reference to the same factors which might have dictated a decision on the part of a professional in the field to recommend such treatment for an individual. Thus necessity is considered in terms of individual need and cannot be based upon the type of operation. This court agrees with the conclusion that the issue of medical necessity is one to be left entirely to the patient's physician.

Pinneke v. Preisser, 47 U.S.L.W. 2790 (N.D. Iowa,

May 11, 1979). See also Curtis v. Page, C.A. No. 78-073 (N.D. Fla., April 18, 1979) (striking down a limitation for doctor's visits in excess of three (3) per month); Fabula v. Buck, 47 U.S.L.W. 2789 (4th Cir., May 21, 1979) (invalidating a state limitation on medical assistance eligibility.)⁽⁷⁾

As the long line of cases dealing with the issues before this Court amply demonstrates, the Social Security Act prohibits states from denying Medicaid coverage on the basis of diagnosis or condition, and requires that states allow payment for all services included in the program which are certified as medically necessary by

⁽⁷⁾

In a few exceptional cases states have been permitted to deny reimbursement for certain services on the grounds that the relevant federal statute had expressly labeled such services as optional. See, e.g., Quern v. Mandley, 436 U.S. 725 (1978) (Emergency Assistance under Title IV of the Social Security Act); Budnicki v. Beal, 450 F. Supp. 546 (E.D. Pa. 1978) (orthopedic shoes). Neither case erodes the proposition that states must conform to the mandatory provisions of the Social Security Act.

(8)
by the attending physician. This principle applies to abortion services as fully as it applies to all other medical services.

The Solicitor General agrees that Title XIX, standing alone, requires participating states to fund medically necessary abortions. See U.S. Brief at _____. He relies on the legislative history of Medicaid which indicates that Congress intended to require the states to pay for certain categories of services and the Secretary of HEW's view that the states must fund medically necessary care within the statutory categories. Id. Thus, the Solicitor

(8)
This Court has emphasized that the question of when an abortion is appropriate is an individual medical issue to be resolved by the woman with the professional help of her physician. Colautti v. Franklin, 439 U.S. 379 (1978). Indeed, Title XIX explicitly relegates the decision about when a procedure is medically necessary to the professional judgment of the physician. Medicaid payments are available "only when and to the extent" the services are "medically necessary as determined in the exercise of reasonable limits of professional discretion." 42 U.S.C. § 1302c(1).

General concludes, as we do, that:

The statute and [HEW] regulation would be violated if a state were to single out medically necessary abortions for exclusion from coverage, because such action by a participating state would constitute a denial of payments based solely on diagnosis (i.e., that an abortion is medically necessary) and condition (i.e., pregnancy). Id.

The Illinois statute at issue here prohibits payment for medically necessary abortions, a clear violation of the provisions of Title XIX.

III. THE HYDE AMENDMENT DOES NOT ALTER ILLINOIS'
OBLIGATIONS UNDER TITLE XIX OF THE SOCIAL
SECURITY ACT

As shown in Part II of this brief, Title XIX of the Social Security Act and its implementing regulations require states that participate in the Medicaid program to fund medically necessary procedures, including abortions. The Illinois legislation challenged in this case plainly conflicts with this Title XIX obligation.

In the present case, the United States Court of Appeals for the Seventh Circuit found that the Hyde Amendment, although enacted as an appropriations measure, worked an implied substantive alteration on state plan requirements under Title XIX. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979). We submit that the Hyde

(9)
Two other courts of appeals and a district court have recently held, contrary to our position, that the Hyde Amendment had the effect of altering state obligations to fund abortions under Title XIX. Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979) (2-1 decision); Hodgson v. Board of County Commissioners, F.2d (8th Cir. 1979) (No. 79-1665) (2-1 decision); McRae v. Califano, 76 C 1805 (S.D.N.Y. January 15, 1980). For the reasons stated in Part III of this brief, we submit that these decisions are clearly erroneous for failing to follow established rules of statutory construction. See Judge Bowne's convincing dissent in Preterm and Judge McManus' dissent in Hodgson.

Amendment does not validate the Illinois legislation at issue here because the Hyde Amendment, as explicit and unambiguous federal appropriations legislation, did not have the effect of changing existing substantive obligations under federal law.

A. The unambiguous language of the Hyde Amendment requires the conclusion that its only effect is to restrict the disbursement of federal funds.

The Hyde Amendment added the following limiting language to the 1978 HEW Appropriations Act, which appropriates "such amounts as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, & Welfare and Related Agencies Appropriations Act"

Provided, that none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

(10)

P.L. 95-205, § 209, 91 Stat. 1460 (1977).

The provision states that "none of the funds provided for in this paragraph shall be used to perform abortions."

The only funds "provided for" by Section 101 are the federal funds appropriated in the language immediately preceding the Amendment. On its face, this language limits only the disbursement of federal funds. There is no reference whatever to state payments, nor are there any words that modify the existing obligations of states under Title XIX.

(10)

The same language was repeated in the Hyde Amendment adopted for fiscal year 1979. 92 Stat. 1586. The 1980 version of the Hyde Amendment eliminates the funding in situations where childbirth would cause severe and long-lasting physical health damage to the woman. 93 Stat. 925, 926.

If Congress wished to alter the states' obligations under Medicaid, it could easily have done so in substantive legislation (which might have provided, for example, that "notwithstanding the provisions of Title XIX no state shall be required to provide funds to (11) perform abortions except") Yet the Hyde Amendment, obviously an appropriations rather than a substantive measure, refers unambiguously to the federal funding component alone. When legislative language is this clear, it must be given its evident significance. See, e.g., Cole v. Harris, 571 F.2d 590, 597 (D.C. Cir. 1977); United States v. United States Steel Corp., 482 F.2d 439, 441 (7th Cir. 1973); Glover Construction Co. v. Andrus, 451 F. Supp. 1102 (E.D. Okla. 1978), citing United States v. Missouri Pacific Railroad, 278 U.S. 269, 277-278 (1929).

(11)

Legislation is currently pending in Congress which would amend Title XIX to eliminate the requirement that the states fund medically necessary abortions. See Cong. Rec. H11770 (daily ed. Dec. 11, 1979) (abortion amendment contained in proposed Child Health Assurance Act of 1979).

Congress' evident desire in enacting the Hyde Amendment — a desire that flowed, no doubt, from the highly charged nationwide debate over the abortion issue — was simply to dissociate direct federal funding from the heated controversy. Changing the substantive rights of needy Medicaid recipients to medically necessary procedures would have been a very significant additional step for Congress to take, a step that would have implicated a number of additional considerations and that would have required substantive legislation, rather than a proviso to an appropriations bill. Congress did not choose to enact such substantive legislation and there is no warrant for giving its appropriations proviso a substantive effect that the language does not suggest or support.

B. Established precedent creates a strong presumption against construing appropriations legislation to make substantive changes in existing law.

The traditional limitations on looking behind unambiguous statutory language are significantly reinforced in this case by doctrines of interpretation specially applicable to appropriations legislation. These doctrines, which reflect the realities of the federal appropriations process, create a general presumption against construing federal appropriations bills to repeal existing substantive law. Thus, even if the language of the Hyde Amendment was seriously ambiguous with respect to existing state obligations under Title XIX, these rules of construction strongly counsel that the ambiguity be resolved against a repeal of Title XIX obligations.

In a series of cases beginning with United States v. Mitchell, 109 U.S. 146, 150 (1883), this Court has repeatedly held that appropriations riders must be construed to avoid a substantive result unless the congressional language clearly states otherwise.

In Mitchell, the Court first articulated the rule that the intention of Congress to alter pre-existing legislation through the appropriations process must be "plain on the face of the statute." Subsequently, in Langston v. United States, 118 U.S. 389, 393 (1886), the Court elaborated: "If by any reasonable construction they [the pre-existing substantive legislation and the appropriations rider] can be made to stand together our duty is to give effect to the provisions of each." Repeal by implication is disfavored such that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton v. Mancari, 417 U.S. 535, 550 (1974).

As noted above, it is clearly possible to construe the Hyde Amendment so as to create no conflict with Title XIX, by simply reading the Amendment as it is written — to withhold federal funds for certain abortions, but to leave standing the clear Title XIX obligations of the states that join the Medicaid

program.

The duty of the courts to construe appropriations legislation, whenever possible, to avoid repeal of substantive legislation was recently underscored by this Court in language directly applicable to the present case:

The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an appropriations measure." . . . This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act. (emphasis in original)

(12)

T.V.A. v. Hill, 437 U.S. 153, 190 (1978)

(12)

Although in T.V.A. v. Hill the doctrine disfavoring repeal by implication through appropriations acts was applied to a positive appropriations measure, the rule has also been applied in situations like the present where the appropriations measure is a limitation of funds for an authorized program. See, e.g., U.S. v. Vulte, 233 U.S. 509 (1914); U.S. v. Langston, 118 U.S. 389 (1886); N.Y. Airways v. U.S., 369 F.2d 743 (Ct. Cl. 1966); Gibney v. U.S. 114 Ct. Cl. 38 (1949); Taylor v. Kjaer, 171 F.2d 343 (D.C. Cir. 1948); NLRB v. Thompson Products, Inc. 141 F.2d 794 (1944).

The greater reluctance of the courts to find an implied repeal of prior substantive law because of a subsequent appropriations statute stems from the distinct character of appropriations measures and the manner in which they are enacted by Congress. This Court explained the distinction in T.V.A. v.

Hill:

When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any forbidden purpose. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.

437 U.S. at 190.

The Hyde Amendment was attached as a rider to an appropriations bill after the bill was reported out of committee. Although the debates on the amendment were

lengthy, no committee hearings were ever held, no methodical assessment of the legislation was ever undertaken. In evaluating the legislative history of the Hyde Amendment, one district court observed:

[L]egislative debates are perhaps the least reliable of enactment materials which can be used in interpreting statutes
[C]ommittee and conference reports are much more productive legislative materials
No such conference or committee reports exist for the Hyde Amendment. It is unduly naive to expect that most Congressmen attend such floor debates . . . and it should be noted that the reports of those debates are permitted to be edited by the speakers.

Planned Parenthood Affiliates of Ohio v. Rhodes, 477

F. Supp. 529, 539 (S.D. Ohio 1979).

Another reason why the rule disfavoring repeals by implication is stringently applied when the alleged repealer is an appropriations measure is the temporary nature of appropriations acts. If the legislation with one year duration is deemed to amend on-going substantive legislation, what happens at the end of a year's time when the repealing act expires? Although Congress re-enacted a version of the original Hyde Amendment

in each of the next three years, the text of the
amendment has changed substantially twice.⁽¹³⁾

The dissent in Hodgson v. Board of County

Commissioners elaborated on the special problems
inherent in repeal through temporary appropriations
legislation:

[Hyde] is, and has been, subject to yearly
change. . . . [G]iven the current political
winds emanating from the abortion storm one
can easily envision future design changes.
An expansive construction of Hyde would not
only undermine the on-going stability of
Medicaid but would also embroil this and other
courts in reviewing such claimed amendments,
year after year. (emphasis in original)

⁽¹³⁾

The version of the Hyde Amendment applicable to
fiscal year 1977 limited federal funding to
situations where the mother's life would be
endangered without an abortion. 90 Stat. 1434
(1976). The version enacted for fiscal years
1978 and 1979 allowed federal funding in two
additional situations: promptly reported cases
of rapes or incest, and cases where childbirth
would cause severe physical health damage. 91
Stat. 1460 (1977); 92 Stat. 1586 (1978). The
1980 version eliminated the federal funding for
cases where childbirth would cause severe
physical health damage. 93 Stat. 925, 926.

Slip op. at 27 (8th Cir. 1979) (No. 79-1665).

To hold that the Hyde Amendment by implication
changes the substantive obligations of the states
participating in Medicaid subjects the states to
the annual uncertainty of federal appropriations,
invites litigation, and injects administrative
problems into the state Medicaid plans.⁽¹⁴⁾

C. The express rule of both Houses of Congress
bolster the presumption against construing an
appropriations measure to alter prior substantive
legislation.

Current legislative rules of both the United States
House of Representatives and the United States Senate

⁽¹⁴⁾

Attributing to the Hyde Amendment a substantive
impact on state obligations under Title XIX
encourages the kind of judicial legislating
engaged in recently by several courts which
essentially redrafted state statutes to parallel
the provisions of the Hyde Amendment. See, e.g.,
Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir.
1979); Preterm, Inc. v. Dukakis, 591 F.2d 121
(1st Cir. 1979), cert. denied, 99 S.Ct. 2181
(1979).

dictate a construction of the Hyde Amendment that avoids a substantive repeal. The House Rule states directly that it is not "in order" for "any provision in any appropriations bill or amendment thereto" to change "an existing law." To the same effect is the Senate Rule, which provides that "[n]o amendment which proposes general legislation shall be received to any general appropriations bill" These

(15)

House Rule XXI (2) provides in full:

No appropriations shall be reported in any general appropriations bill, or by an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress, nor shall any provision in any such bill or amendment thereto changing an existing law be in order.

Senate Rule 16.4 provides in full:

No amendment which proposes general legislation shall be received to any general appropriations bill, nor shall any amendment not germane as relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of funds appropriated which proposes a limitation

explicit rules may, of course, be deliberately waived by either House in particular circumstances. No such waiver, however, occurred in connection with the passage of the Hyde Amendment.

(16)

In fact, Rep. Hyde, the sponsor of the Amendment and one of its staunchest supporters apologized for attaching it to an appropriations bill:

Footnote 15 con't

not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriations bill may be laid on the table without prejudice to the bill.

(16)

Senator Goldwater raised a point of order, on the grounds of germaneness and whether the proposed amendment would constitute legislation on an appropriations bill. Upon questioning he limited his request to the question of germaneness and the Senate voted that it was germane. The Senate never waived the rule prohibiting legislating on an appropriations bill. 123 Cong. Rec. S.11055 June 29, 1977; See also, Zbaraz, 596 F.2d n. 13, (1979) where the court expressly declined to rely on any waiver of the rules of Congress.

Yesterday remarks were made that it is unfortunate to burden an appropriations bill with complex issues, such as busing, abortion, and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill.

123 Cong. Rec. H6083 (daily ed. June 17, 1977).

Although Rep. Hyde would have preferred to enact substantive legislation, he was well aware that the legislation he was proposing only affected federal funding of abortions. As he stated during the 1976 debates, the rider was "intended . . . to prevent the use of Federal funds to pay for abortions . . ." 122 Cong. Rec. H10314 (1976).

In T.V.A. v. Hill, the Court explicitly cautioned, in a similar context, against adopting a substantive interpretation of an appropriations bill that would "flout the very rules that Congress carefully adopted" 437 U.S. at 190.

As Judge Bownes correctly observed in his dissent in Preterm, Inc. v. Dukakis, 591 F.2d 121, 138 (1st Cir. 1979), cert. denied, 99 S.Ct. 2181 (1979):

Are we to assume that Congress deliberately evaded and ignored its own procedural rules, or forgot about them, or was entirely ignorant of them? The only logical conclusion that gives due deference to Congress' knowledge and respect for its own procedural requirements is that the Hyde Amendment was limited to the use of federal funds only.

At the very least, the debates do not show a purpose to repeal with that great degree of clarity that would be necessary to justify this Court's ignoring plain statutory language and the explicit rules of both Houses of Congress. (17)

(17)

In this regard see the introductory language to the HEW regulations implementing the Hyde Amendment. 43 Fed. Reg. 4833. HEW noted that the Congressional debates were "at times inconsistent or inconclusive." In general, it failed to find any clear "official expression of even one House of Congress as to the meaning of this statute." The HEW regulations, as noted below, went on to implement the Amendment solely as a limit on federal funding.

Appellants rely primarily on statements made by
opponents of the Amendment, who were arguing to defeat
(18)
its passage. See, e.g., Intervenor's Brief at 57.
Opponents' statements are generally and properly
recognized as the least reliable source of legislative
history regarding the purpose or effect of legislation.
As noted by the Second Circuit "the United States
Supreme Court has, of course, often cautioned against
the danger of reliance upon the views of a bill's
opponents. In their zeal to defeat a bill, they
understandably tend to overstate its reach." United
States v. Oates, 560 F.2d 45, 71, n. 27, (2d Cir. 1977),

(18)

Appellants rely on several statements by proponents
of the Hyde Amendment. See Intervenor's Brief at
96-99; State's Brief at 59-60. These statements
apparently assume that the states will have a choice
whether to fund abortion. The statements, however
demonstrate confusion and misunderstanding of the
states' obligation under Title XIX with respect to
medically necessary services, including abortions.
The remarks are also ambiguous. They may mean to
refer to abortions that are not medically necessary
and that are therefore not covered by Title XIX.

quoting from N.L.R.B. v. Fruit and Vegetable Packers
and Warehousemen Local 760, 377 U.S. 58, 66 (1964).
See also, the Supreme Court's plain direction in
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S.
384, (1951). "The fears and doubts of the opposition
are no authoritative guide to the construction of
legislation. It is the sponsors that we look to when
the meaning of the statutory words is in doubt." Id.
at 394-5.

The Solicitor General's contention in this case is
directly in conflict with the position expressed in an
earlier memorandum. In the case of Buckley v. McRae,
appeal dismissed, 433 U.S. 916 (1977), the Solicitor
General argued that the substantive "rights to obtain
or perform an abortion were not and could not have been
restricted by the enactment of the Hyde Amendment,"
since "it is clear that, under the Medicaid program,
the states' duty to fund medical procedures covered by
by their plans is wholly independent of their right to

subsequent federal reimbursement." Memorandum in
Opposition to Stay Pending Appeal at 6.

D. The legislative history of the Hyde Amendment does not demonstrate an intention to repeal existing state obligations under the Social Security Act.⁽¹⁹⁾

The debates leading up to the enactment of the various Hyde Amendments, taken as a whole, support the proposition that the proponents of the Amendment intended only to limit the use of federal funds rather than to repeal portions of Title XIX of the Social Security Act.⁽¹⁹⁾

Nowhere in the debates does any Congressman manifest an intention to change the substantive provisions of Title XIX regarding the states' duty to provide medically necessary services, including abortions.

The burden of course, lies with appellants to show that the legislative history unambiguously contradicts the

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See Zbaraz Brief at _____ for an exhaustive account of the congressional debates on the Hyde Amendment.

clear statutory language.

In looking to statements made by the sponsors of the Hyde Amendment, there is no indication of a purpose to repeal Title XIX obligations. Consider Congressman Hyde's summation of his position: "The position is that no federal funds go to pay for abortions." 123 Cong. Rec. H10830 (daily October 12, 1977) (emphasis added). Indeed, Congressman Hyde expressed his frustration that his attempts to engage Congress in more substantive revision of abortion rights had failed and that a limitation on federal appropriations was his only remaining avenue. See p. 6, supra. Congressman Edwards, another supporter of the Amendment, noted that "the only thing that we can address ourselves to in this body, and the only thing that we have any control over is what we do with federal dollars." Id. at 6090 (daily ed. June 17, 1977) (emphasis added). On the same day Congressman Dornan, also a

supporter of the Amendment noted that it does not violate any substantive privacy rights, but "simply denies federal funds for the realization of a personal subjective decision and judgment." Id. at H6086 (emphasis added). These directly relevant remarks at the beginning of the debate by proponents of the Amendment were never challenged, withdrawn or refuted. Given "the absence of any statement during the course of the lengthy debate that the Hyde Amendment was making a significant change in the Medicaid Act," Preterm v. Dukakis, 121 F.2d at 136 (Bownes, J. dissenting), these explicit assertions that restrictions on federal funds alone were the purpose of the legislation adequately refute appellants' contention that the legislative history shows an unambiguous intention to amend Title XIX.

E. THE PRESUMPTION AGAINST AN EXPANSIVE IMPLIED CONSTRUCTION OF AN APPROPRIATIONS STATUTE IS JUSTIFIED BY BASIC PRINCIPLES OF THE SEPARATION OF POWERS.

Appellants urge the Court to infer that Congress intended the Hyde Amendment to eliminate the states' obligation to fund Medicaid abortions even though Congress did not say so because such was the "common understanding" among Congressmen. See U.S. Brief at _____. A similar argument was urged upon the Court and rejected in T.V.A. v. Hill, even though it resulted in the costly abandonment of a nearly completed federal dam:

[W]e are urged to view the Endangered Species Act 'reasonably' and hence shape a remedy 'that accords with some modicum of common sense and the public weal.' But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt Congressional action by judicially decreeing what accords

with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.

437 U.S. 153, 194 (1978).

Even if interpreting the Hyde Amendment as merely a restriction on federal spending seems unwise or inequitable to some because it leaves the states to foot the Medicaid bill for therapeutic abortions, certainly it is not this Court's role to expand the impact of the Hyde Amendment beyond the clear intention of Congress. As noted by the district court in Planned Parenthood Affiliates of Ohio v. Rhodes:

The fact that some may view the added burden created by the Hyde Amendment upon the states as "anomalous" or "inequitable" is, of course, beyond the scope of proper inquiry for this Court. It is quite possible that the proponents of the amendment were unaware of its ramifications in light of Title XIX. It is not for this Court to attempt to improve upon what Congress had done because a litigant maintains that more would have been done if a certain problem were foreseen. The solution lies with Congress.

477 F. Supp. 529, 539 (S.D. Ohio 1979) (emphasis added).

The Congressmen speaking on the Amendment were perhaps unfamiliar with the complicated provisions of the Medicaid statute governing the administration of state plans and were not aware that states participating in Medicaid are required to fund medically necessary abortions.

In T.V.A. v. Hill, the Court expressly declined to make the vague "understanding" of the appropriations committee that "the earlier legislation would not prohibit the proposed expenditure" into the law by redrafting the statute. 437 U.S. at 191. Although several Congressmen while debating the Hyde Amendment evidenced a desire to halt all public financing of abortion, we fail to see why their views should be attributed to Congress as a whole in contravention of the clear language of the Amendment itself. In fact, Justice McManus, dissenting in the recent case of Hodgson v. Board of County Commissioners, criticized the majority for judicially redrafting the language

of the Hyde Amendment to work a substantial alteration on Title XIX:

If Congress intends that neither the federal nor state governments fund medically necessary abortions, it knows full well how to make its intent clear and manifest by forthrightly amending Medicaid directly. To permit Congress to do less is tantamount to having courts legislate, by judicial interjection under the guise of construction, what Congress has been unable or unwilling to do by clear and manifest enactment.

slip op. at 27 (8th Cir. 1979). He viewed the majority's conclusion that the Hyde Amendment substantively amended Medicaid as nothing less than an "abdication [by the courts] of their proper role in our tri-partite system of government." Id. at 28.

F. THE INTERPRETATIVE REGULATIONS OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE — THE FEDERAL AGENCY CHARGED WITH ADMINISTRATION OF THE HYDE AMENDMENT — DO NOT CONSTRUE THE AMENDMENT TO REPEAL TITLE XIX OBLIGATIONS.

The last paragraph of the 1978 Hyde Amendment requires that the Secretary of HEW "promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced." Such regulations were originally issued on February 3, 1978, 43 Fed. Reg. 4833, two months after enactment of the Hyde Amendment. Amended regulations were issued on July 21, 1978, 43 Fed. Reg. 31868; 42 C.F.R. §§ 50.301-50.310 (1978).

Interpretative regulations promulgated by the federal agency charged with the administration of a federal statute are entitled to substantial respect. See, e.g., Griggs v. Duke Power Co., 401 U.S. 433 (1970); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1970); United States v. City of Chicago, 400 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965).

This respect is especially due when, as here, "the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961).

Prior to the enactment of the Hyde Amendment, HEW had issued detailed regulations implementing Title XIX of the Social Security Act. See 42 C.F.R. § 440.230 (1978). These regulations reflect and incorporate the funding obligations that Title XIX places upon states that participate in the Medicaid program. See, e.g., 42 C.F.R. § 440.230(a), (b) and (c). The specific HEW Hyde Amendment regulations, however, which were adopted in light of these prior general regulations, regulate only the expenditure of federal funds — no mention whatever is made of state expenditures or the fulfillment of state obligations

under Title XIX. Thus, the introduction to the original Hyde Amendment regulations states that they are designed to specify "when federal funds may be used to pay for abortions." 43 Fed. Reg. 4833 (Feb. 3, 1978). The regulations themselves describe as the general rule of the Hyde Amendment that "federal financial participation is not available for the performance of an abortion except under circumstances described" 42 C.F.R. § 50.303 (emphasis added). Specific provisions of the regulations are addressed only to the question of when "federal financial participation is available." 42 C.F.R. §§ 50.304, 50.305, 50.306, 50.307, 50.308. The omission from the HEW regulations of any reference to a modification of state obligations is particularly significant in view of the direction in the Hyde Amendment that the Department's regulations ensure that all of the Amendment's new provisions be "rigorously enforced."

In response to a comment on the original HEW Hyde Amendment regulations, HEW responded by explaining that:

These regulations only govern the instances where Federal funding is available for abortions and other medical procedures. They do not deal with the separate question of circumstances under which a State must fund abortions under the medicaid program. 43 Fed. Reg. 31875 (July 21, 1978).

In short, HEW plainly has not deemed the Hyde Amendment to be a partial repeal of Title XIX.

IV. VIEWED PURELY AS A FEDERAL APPROPRIATIONS MEASURE THE HYDE AMENDMENT DOES NOT ALTER ILLNOIS' OBLIGATIONS UNDER TITLE XIX OF THE SOCIAL SECURITY ACT.

As shown in Part II of this brief, Title XIX of the Social Security Act and its implementing regulations require states participating in Medicaid to fund medically necessary abortions. The substantive requirements of Title XIX with respect to state abortion funding were in no way altered by the Hyde Amendment which withdrew the partial federal reimbursement previously available to the states for Medicaid abortions. The Solicitor General on behalf of the United States argues that even when construed simply as a federal appropriations act, the Hyde Amendment automatically eliminated the Title XIX requirement that the states fund therapeutic abortions.

The Solicitor General attempts to sidestep the issue of whether the Hyde Amendment is an implied alteration of the substantive provisions of Title XIX

through a novel interpretation of the Medicaid
(20)
funding scheme. He contends that the states are
not compelled to fund any medical service for which
they do not receive partial federal reimbursement
and therefore, the states' obligation to fund
medically necessary abortions for which they could
not receive matching federal funds automatically
ceased when the Hyde Amendment was passed. See
U.S. Brief at ____.

This contention, however, is inconsistent with the
history of the Social Security program. Since its
enactment there have been numerous occasions in which
the states have come under specific funding obligations

(20)

We note that the Solicitor General declines to
adopt the view of the courts of appeals which have
held that Hyde substantively amended Title XIX.
See U.S. Brief at ____.

(21)
without any right to matching federal funds.

(21)

For example, when the Supplemental Security Income
(SSI) program was enacted in 1973 to replace the
previous programs of aid to the aged, blind or
disabled, the federal statute required that the
states, as a condition of participation in Medicaid,
supplement the monthly SSI payments to persons who
were receiving assistance as of December 1973,
in order to avoid reductions in grants. This
mandatory supplement was to be funded entirely
by the states. See Public Law 93-66, § 212, 93d
Cong., 1st Sess. (1973), 42 U.S.C. § 1381 et. seq.
(Supp. 1973). This requirement has been enforced
by federal courts, see, e.g., Vargas v. Trainor,
508 F.2d 485 (7th Cir. 1974). Similarly, where
states had previously elected to provide Medicaid
to certain groups of people, entirely at state
expense, the federal statute prohibited states
from terminating Medicaid eligibility. See
Lewis v. Shulimson, 400 F. Supp. 807. (E.D. Mo.
1975).

See also, Justice Douglas' dissent in Dandridge
v. Williams, 397 U.S. 471 (1970), discussing
statutory changes in the AFDC program. Mr. Justice
Douglas quotes Representative Mills as saying that
the new limits on federal funding would have no
effect on the obligations theretofore placed on
the states.

Other provisions of the Social Security Act
also specify circumstances under which the states

The basic scheme of Medicaid easily accommodates the requirement of state funding for a particular service for which no federal reimbursement is available. Federal financial participation in Medicaid is not computed on an item for item basis but as a percentage of the total state expenditure. See 42 U.S.C. §1396d(b). As the district court in Doe v. Matthews concludes:

The Hyde Amendment appears to be simply a limitation on the federal government's undertaking under Title XIX to reimburse jurisdictions participating in the Medicaid program . . . A state then may have assumed the risk, in setting up its medical assistance program, of in fact paying for a somewhat greater share of the cost of the program than it might have originally anticipated.

Footnote (21) con't

are required to expend funds which are not matched by federal participation. See, e.g., 42 U.S.C. 1396a(a)(2), providing that the states must ensure adequate payments despite a lack of local contributions; 42 U.S.C. 1396a(a)(18), prohibiting state liens on the property of recipients of medical assistance or adjustment or recovery of benefits; 42 U.S.C. 1396a(c), providing that state plans, that result in a reduction of money payments will not be approved; 42 U.S.C. 1396b(g), providing for a reduction in the federal percentage contributed to medical assistance where the state does not have an effective program of control over expenditures; and 42 U.S.C. 603(g), providing for a reduction in the amount of reimbursement by the federal government to the states in certain circumstances.

422 F. Supp. 141, 143 (D.D.C. 1976); accord, Doe v. Matthews, 420 F. Supp. 865 (D.N.J. 1976).

Similarly, the district court in Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979), noting initially that state participation in Medicaid is voluntary, cautioned that "the basic policy of Title XIX, the enabling of each state to furnish medical assistance to the needy" should not be confused "with the basic mechanism by which Congress seeks to effect that policy, the provision of federal funds on a cooperating basis with participating states." Id. at 1333. The court noted further that:

[It] is not the case, nor is it required by Title XIX, that there be federal financial participation in ever service necessarily provided by a participating state. Indeed, in the instant case it has been stipulated that the State of Georgia provides 100% of the premiums for the insurance program established by Part B of Title XVIII, 42 U.S.C. 1395, et. seq., on behalf of persons simultaneously covered by Medicare and Medicaid. See 42 U.S.C. 1396b(b)(1). Id.

The district court in Planned Parenthood Affiliates of Ohio v. Rhodes reached the same conclusion:

This Court cannot agree that exclusive state funding of medically necessary abortions is at all at variance with the "basic policy" of the Medicaid system. The "basic policy" of Title XIX, embodied in § 1396, is to provide medical assistance and rehabilitation services for certain individuals. There is no intrinsic value in the federal-state cooperation involved in Title XIX, except as a means to this end. Section 1496 does not foreclose, even by intimation, the possibility that a state might be required to fund exclusively one or more services in order to receive the federal appropriations authorized by § 1396.

477 F. Supp. 529, 538.

CONCLUSION

For the reasons set forth above, Amici respectfully request your Honorable Court to affirm the judgment of the Western District of Illinois either upon the grounds advanced therein or upon the alternative statutory grounds urged in the foregoing brief.

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October Term, 1979

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Appellants,)
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DAVID ZARAZ, M.D., et al.,)
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_____)

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THE PHYSICIANS NATIONAL HOUSESTAFF
ASSOCIATION, THE MEXICAN AMERICAN
WOMEN'S NATIONAL ASSOCIATION,
THE PUERTO RICAN LEGAL DEFENSE AND
EDUCATION FUND AND THE NATIONAL
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TABLE OF CONTENTS

	Page
Table of Authorities	i
QUESTIONS PRESENTED	1
INTEREST OF AMICI CURIAE	2
I. FAILURE OF APPELLANT ILLINOIS TO PAY FOR ALL MEDICALLY NECESSARY MEDICAID ABORTIONS WILL DAMAGE THE HEALTH OF INDIGENT PREGNANT WOMEN.	5
SUMMARY OF ARGUMENT	18
II. TITLE XIX REQUIRES STATES TO PROVIDE ALL MEDICALLY NECESSARY MANDATORY SERVICES.	18
A. The Statutory History	18
B. The Case Law	26
III. RESTRICTIONS ON THE AVAILABIL- ITY OF SERVICES MUST BE BASED ON ACROSS-THE-BOARD STANDARDS DRAWN IN AN EVEN-HANDED FASHION WITHOUT DISCRIMINATION BASED ON DIAGNOSIS, TYPE OF CONDITION OR ILLNESS.	42
IV. THE PARTIAL WITHDRAWAL OF FEDERAL FUNDING FOR A SERVICE IS NOT TANTAMOUNT TO A PRO TANTO REPEAL OF THE MEDICAID STATUTES.	46
CONCLUSION	53

TABLE OF AUTHORITIES

<u>Federal Cases</u>	<u>Page</u>
<u>Allen v. Richardson</u> , 366 F. Supp. 516 (E.D. Mich. 1973).....	30,41
<u>American Association of Physicians and Surgeons v. Weinberger</u> , 395 F. Supp. 125 (N.D. Ill. 1975).....	38
<u>Beal v. Doe</u> , 432 U.S. 437 (1977).....	18
<u>Burns v. Alcala</u> , 420 U.S. 575 (1975)	16
<u>Coe v. Hooker</u> , 406 F. Supp. 1072 (D.N.H. 1976)	26
<u>Crane v. Mathews</u> , 417 F. Supp. 532 (N.D. Ga. 1976)	35
<u>Curtis v. Page</u> , Slip Op. No. 79-2244 (N.D. Fla. 4-18-79)	16,26,35
<u>District of Columbia Podiatry Society v. District of Columbia</u> , 407 F. Supp. 1259 (D. D.C. 1975) ..	28,29,36
<u>Dodson v. Parham</u> , 427 F. Supp. 97 (N.D. Ga. 1977)	30
<u>Doe v. Beal</u> , 523 F.2d 611 (3d Cir. (1975), <u>rev'd on other grounds</u> <u>sub nom Beal v. Doe</u> , 432 U.S. 438 (1977)	18,26,31
<u>Doe v. Bolton</u> , 410 U.S. 179 (1973)	29,39

<u>Federal Cases</u>	<u>Page</u>
<u>Doe v. Busbee</u> , 471 F. Supp. 1326 (N.D. Ga. 1979)	9,26,31
<u>Doe v. Kenley</u> , 584 F.2d 1362 4th Cir. 1978)	26,29
<u>Doe v. Pickett</u> , Slip Op. No. 79-322H (S.D. W. Va. 11-30-79)	26
<u>DR v. Mitchell</u> , 456 F. Supp. 609 (D. Utah 1978)	8,28,29,38
<u>Drennan v. Harris</u> , 606 F.2d 846 (9th Cir. 1979)	29
<u>Emma G. v. Edwards</u> , 434 F. Supp. 1048 (E.D. La. 1977).....	9
<u>Feld v. Berger</u> , 424 F. Supp. 1356 (S.D.N.Y. 1976)	46,52
<u>Frieman v. Walsh</u> , Slip Op. No. 77-4171-CV-C (W.D. Mo. 1-26-79), <u>rev'd on other grounds sub nom</u> <u>Reproductive Health Services</u> <u>v. Freeman</u> , Slip Op. No. 79- 1275 (8th Cir. 1-9-80)	28
<u>Greater New York Hosp. Assn. v.</u> <u>Blum</u> , 476 F. Supp. 234 (E.D.N.Y. 1979)	30,41
<u>Hodgson v. Bd. of County Commissioners</u> , Slip. Op. No. 79-1665 (8th Cir. 1-9-80)	28,44
<u>Hultzman v. Weinberger</u> , 495 F.2d 1276 (3d Cir. 1974)	30

<u>Federal Cases</u>	<u>Page</u>
<u>Idaho Corp. of the Benedictine Sisters v. Marks, CCH Medicare/Medicaid Guide ¶29,768 (D. Ida. 8-29-73)</u>	28
<u>Lady Jane v. Maher, 420 F. Supp. 318 (D. Conn. 1976)</u>	28
<u>McMahon v. Califano, 476 F. Supp. 978 (D. Mass. 1979)</u>	30,41
<u>McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976)</u>	53
<u>Medical Society of New York v. Toia, 560 F.2d 535 (2d Cir. 1977)</u>	25,29
<u>Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)</u>	36
<u>Mount Sinai Hosp. v. Weinberger, 517 F.2d 329 (5th Cir. 1975), rev'g in part 376 F. Supp. 1099 (S.D. Fla. 1974), cert. denied, 425 U.S. 935</u>	29
<u>Pennsylvania Welfare Rights Organization v. Shapp, 602 F.2d 1114 (3d Cir. 1979)</u>	26
<u>Pinneke v. Preisser, CCH Medicare/Medicaid Guide ¶29,756 (N.D. Iowa 1979)</u>	27
<u>Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979) cert. denied U.S. , 99 S. Ct. 2181-2 (1979)</u>	27,31,34,36,44

<u>Federal Cases</u>	<u>Page</u>
<u>Public Citizen Health Research Group v. H.E.W., 449 F. Supp. 937 (D.D.C. 1978)</u>	30
<u>Reproductive Health Services v. Freeman, Slip Op. No. 79-1275 (8th Cir. 1-9-80)</u>	9
<u>Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978)</u>	5,26,30
<u>Roe v. Ferguson, 389 F. Supp. 387 (S.D. Ohio 1974)</u>	26
<u>Roe v. Norton, 380 F. Supp. 726 (D.Conn. 1974), 522 F.2d 928 (2d Cir. 1975), rev'd on other grounds sub nom Maher v. Roe, 432 U.S. 464 (1977)</u>	26,27,30
<u>Roe v. Wade, 410 U.S. 113 (1973)</u>	17
<u>Rush v. Parham, 440 F. Supp. 383 (N.D. Ga. 1977)</u>	26,31
<u>Simpson v. Wilson, Slip Op. No. 77-261 (D.Vt. 10-26-79)</u>	28
<u>Smith v. Trainor, Slip. Op. No. 76C526 (N.D. Ill. 10-19-79)</u>	30
<u>Smith v. Vowell, 379 F. Supp. 139 (W.D.Tex. 1974)</u>	26
<u>Stenson v. Blum, Slip Op. Civ. No. 78-6044 (S.D.N.Y. 9-18-79)</u>	47,52

<u>Federal Cases</u>	<u>Page</u>
<u>Szekely v. Florida Medical Assn.</u> 517 F.2d 345 (5th Cir. 1975)	30
<u>Turecamo v. Commr., Internal Revenue</u> , 554 F.2d 564 (2d Cir. 1977)	30,41
<u>Virginia Hospital Assn. v. Kenley</u> , 427 F. Supp. 781 (E.D. Va. 1977)	16,28
<u>Westgard v. Weinberger</u> , 391 F. Supp. 1011 (D. N.D. 1975)	30
<u>White v. Beal</u> , 555 F.2d 1146 (3d Cir. 1977)	27,44
<u>Women's Health Services v. Maher</u> , Slip Op. No. H-79-405 (D.Conn. 1-7-80)	28
<u>Zbaraz v. Quern</u> , 596 F.2d 196 (7th Cir. 1979)	27,44

<u>State Cases</u>	
<u>Brooks v. Smith</u> , 356 A.2d 723 (Me. 1976)	27
<u>Denise R. v. Lavine</u> , 347 N.E.2d 893 (N.Y. Sup. Ct. 1976)	28
<u>Doe v. State Dept. of Public Welfare</u> , 257 N.E.2d 816 (Minn. 1977)	27
<u>Ferro v. Lavine</u> , 79 Misc.2d 431 (Sup. Ct. N.Y., Chenango Cty. 1974)	27

<u>State Cases</u>	<u>Page</u>
<u>G.B. & J.D. v. Lackner</u> , 80 Cal. App.3d 64 (1978)	27
<u>Kleinwachter v. Dept. of Health and Social Services</u> , CCH Medicare/Medicaid Guide ¶27,383 (Dane County, Wis. Cir. Ct. 4-8-75)	27
<u>Mead v. Burdman</u> , CCH Medicare- Medicaid Guide ¶28,957 (King Cty. Super. Ct., Wash. 3/20/78)	41
<u>Metropolitan Hospital v. Pennsylvania</u> , 21 Pa. Commonwealth 116 (1975)	28
<u>Monmouth Medical Center v. State of New Jersey</u> , 80 N.J. 299 (N.J. Sup. Ct. 1979)	27,28
<u>Morris v. Williams</u> , 67 Cal.2d 733, 63 Cal. Rptr. 689, 433 P.2d 697 (1967)	26
<u>Penn. Dept. of Public Welfare v. Temple University</u> , 21 Pa. Commonwealth 162, CCH Medicare/ Medicaid Guide ¶27,589 (1975)	28,29
<u>Price v. Putnam</u> , Slip Op. No. 1288 (Or. Ct. App. 4-18-79)	30,41
<u>Right to Choose v. Byrne</u> , 169 N.J. Super. 543 (N.J. Super. Ct. 1979)	27

<u>Federal Statutes</u>	<u>Page</u>
42 U.S.C. §301 (1960)	21
42 U.S.C. §601	17
42 U.S.C. §603(f)	49
42 U.S.C. §603(g)	49
42 U.S.C. §603(j)	47,49
42 U.S.C. §1320(c).....	23,33
42 U.S.C. §1320c(1)	19
42 U.S.C. §1320c(2)	19
42 U.S.C. §1320c-4(a)(1)	19
42 U.S.C. §1320c-5(b)	19
42 U.S.C. §1320c-5(d)	19
42 U.S.C. §1320c-9(a)(1)	19
42 U.S.C. §1320c-9(a)(2)	19
42 U.S.C. §1320c-9(b)(3)	19
42 U.S.C. §1320c-20	19
42 U.S.C. §1320c-20(a)(1)	39
42 U.S.C. §1320c-21	19,23
42 U.S.C. §1396	17,19,21
42 U.S.C. §1396a(a)(10)	22,43
42 U.S.C. §1396a(a)(10)(C)(1)	19

<u>Federal Statutes</u>	<u>Page</u>
42 U.S.C. §1396a(a)(13)	20,22
42 U.S.C. §1396a(a)(13)(B)...19,21,32,33	
42 U.S.C. §1396a(a)(13)(C)	21,32,33
42 U.S.C. §1396a(a)(14)	19
42 U.S.C. §1396a(a)(14)(A)	24,35,37
42 U.S.C. §1396a(a)(15)	48
42 U.S.C. §1396a(a)(17)	19,32,34,43
42 U.S.C. §1396a(a)(17)(D)	37
42 U.S.C. §1396a(a)(19)	19,43
42 U.S.C. §1396a(a)(20)(B)	19
42 U.S.C. §1396a(a)(26)(A)	19
42 U.S.C. §1396a(a)(26)(B)	19
42 U.S.C. §1396a(a)(28)	19
42 U.S.C. §1396a(a)(30)	19,23,25,36
42 U.S.C. §1396a(a)(31)	19,23,33
42 U.S.C. §1396a(a)(33)	19,23,33
42 U.S.C. §1396a(c).....	35
42 U.S.C. §1396a(c)(i).....	21
42 U.S.C. §1396a(d)(repealed)	22
42 U.S.C. §1396b(a)(1)	47,48

<u>Federal Statutes</u>	<u>Page</u>
42 U.S.C. §1396b(b)(1).....	46,48
42 U.S.C. §1396b(e)	32,33
42 U.S.C. §1396b(g)	19,23,33,46,49
42 U.S.C. §1396d	37
42 U.S.C. §1396d(a)	25
42 U.S.C. §1396d(a)(vii)(4)(B)	19
42 U.S.C. §1396d(a)(vii)(6-17)	32
42 U.S.C. §1396d(h).....	19,24

<u>Federal Regulations</u>	
42 C.F.R. §5.4, Appendix A, Part I (1978)	13
42 C.F.R. 431.52(b)	51
42 C.F.R. 431.53	47
42 C.F.R. 431.250(e)	46,50
42 C.F.R. 431.591	47
42 C.F.R. 431.592	47
42 C.F.R. 431.597	47
42 C.F.R. 431.625	48
42 C.F.R. 432.50	47,48,49
42 C.F.R. 433.10	47

<u>Federal Regulations</u>	<u>Page</u>
42 C.F.R. 433.10(b).....	47,48
42 C.F.R. 433.15	47,48,49
42 C.F.R. 433.15(c)(1).....	48
42 C.F.R. 433.112-.114	47
42 C.F.R. 435.3	34
42 C.F.R. 435.930	47
42 C.F.R. 435.1001-.1011	47
42 C.F.R. 435.1003	51
42 C.F.R. 438.801	47
42 C.F.R. 440.10	42
42 C.F.R. 440.20	42
42 C.F.R. 440.21	47
42 C.F.R. 440.50	25,42
42 C.F.R. 440.130(C)(4)	25
42 C.F.R. 440.130(C)(13)	25
42 C.F.R. 440.170(e)	51
42 C.F.R. 440.210	42
42 C.F.R. 440.220	42
42 C.F.R. 440.230	34,36
42 C.F.R. 440.230(b)	34

<u>Federal Regulations</u>	<u>Page</u>
42 C.F.R. 440.230(c).....	42
42 C.F.R. 440.230(c)(2)	43
42 C.F.R. 440.50.....	25
42 C.F.R. 441.11	47,48,52
42 C.F.R. 441.13	47
42 C.F.R. 441.70	46
42 C.F.R. 447.15	35
42 C.F.R. 447.35	47
42 C.F.R. 447.45(d)(4)	46,50
42 C.F.R. 447.252	47
42 C.F.R. 447.53.....	35
42 C.F.R. 449.41(c)	46
42 C.F.R. 456.6	40
42 C.F.R. 456.51(b)	40
42 C.F.R. 456.111	40
42 C.F.R. 456.141	40
42 C.F.R. 456.6	40
42 C.F.R. 456.608	40
42 C.F.R. 463.10	40
42 C.F.R. 463.16(C)(1)	41

<u>Federal Regulations</u>	<u>Page</u>
42 C.F.R. 463.27	41
44 C.F.R. 435.1003.....	47
45 C.F.R. 201.14(a)(3).....	46
45 C.F.R. 206.10(a)(5).....	47

Congressional History

House Rept. No. 1799, 86th Cong., 2d Sess. (1960).....	21
Sen. Rept. No. 404, 89th Cong., 1st Sess. (1965), <u>reprinted</u> <u>in 1 U.S. Code Cong. & Admin.</u> <u>News 1943</u>	20,37
Sen. Rept. No. 91-222, 91st Cong., 1st Sess. (1969), <u>reprinted in</u> <u>1 U.S. Code Cong. & Admin. News</u> <u>1077</u>	22,32
Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (1972)	22,23,25,41
113 Cong. Rec. S11044 (6-29-77) Sen. Birch Bayh	11

Miscellaneous

<u>Abortions and the Poor: Private</u> <u>Morality, Public Responsibility,</u> <u>Alan Guttmacher Institute,</u> <u>1979</u>	8,9,10
Chavkin, D., "Trends in State Adminis- tration of Medicaid Programs" (HEW Health Care Financing Administra- tion 1978)	15,16

<u>Miscellaneous</u>	<u>Page</u>
<u>Cost and Quality of Health Care:</u>	
<u>Unnecessary Surgery, Report by</u> the Subcommittee on Oversight and Investigation of the Committee On Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976).....	25
<u>Data on the Medicaid Program (HEW</u> Health Care Financing Administration 1979)	16
GAO Report H.R.D. 79-96, Simplify- ing the Medicare-Medicaid Buy- In Program, 1979	46
Handbook of Public Assistance Administration, Supplement D (HEW 1966).....	43
Harrison, B., "Welfare Payments and the Reproduction of Low Wage Workers and Secondary Jobs," Dollars and Sense (No. 53, Jan. 1980) pp. 12-13.	17
<u>Health Systems Plan for the City</u> <u>of Chicago, 1979-1980</u>	14,15
Medical Assistance Manual (DHEW)	47,48,50
<u>1975 Recipient Characteristics Study,</u> DHEW, Social Security Adminis- tration, 77-11-777.....	16,17

-xiii-

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THE PUERTO RICAN LEGAL DEFENSE AND
EDUCATION FUND AND THE NATIONAL
CONFERENCE OF BLACK LAWYERS.

QUESTIONS PRESENTED

1. Does Title XIX require the states to provide an irreducible minimum of medically necessary care in the five basic service categories to the mandatory eligibles?

2. May a state discriminate in its provision of a mandatory service based on the diagnosis, type of illness or condition?

3. Are a state's Title XIX obligations for specific services hinged upon the availability of a fixed percentage of federal funding for each of those services?

INTEREST OF AMICI CURIAE

This brief is filed with the consent of all parties to this appeal, pursuant to Rule 42.

The Physicians National Housestaff Association (PNHA), headquartered in Washington, D.C., is a professional organization of 12,000 interns and residents who staff this nation's teaching hospitals. PNHA's chapters are located throughout the country, including one in Chicago, Illinois. The purpose of the organization is to improve the working conditions and the quality of patient care in public hospitals. PNHA's members perform a large number of the Medicaid abortions that occur in the United States, as well as deliver a large number of the Medicaid babies born in this country from both normal and high risk pregnancies. PNHA's members are concerned that their inability to perform all

medically necessary abortions for their indigent patients will adversely affect their ability to care properly for, and damage the health of, those patients.

The Mexican American Women's National Association (MAWNA) was formed in 1974 to represent the interests of over three million Mexican American women in this country. The organization, headquartered in Washington, D.C., was created to establish a national forum by which Mexican American women can advocate on issues of concern to them and create public awareness of those concerns. MAWNA has had a long-standing interest in health issues in general and reproductive rights issues in particular. MAWNA is concerned that the inability of indigent Mexican American women to choose and obtain medically necessary Medicaid abortions will have an adverse impact on the status of Mexican American women's health in this country.

The Puerto Rican Legal Defense and Education fund (PRLDEF) is a non-profit corporation located in New York City. Its purpose is to defend the interests of Puerto Ricans and other Hispanics in the

United States by providing representation on issues of concern to that community, which statistics indicate may be the poorest minority in the United States. PRLDEF is concerned that the inability of indigent Puerto Rican women to choose and obtain medically necessary abortions will have an adverse impact on their health, their ability to obtain and retain employment and to raise their children.

The National Conference of Black Lawyers (NCBL) is comprised of 1500 Black lawyers, judges, law professors and law students. NCBL was chartered to work for the elimination of racism in the law and to address the problems of the Black community. Thus, NCBL is concerned with the discriminatory impact on poor minority women of a failure to fund medically necessary Medicaid abortions, particularly the susceptibility of Black women to the pregnancy-related complications of sickle cell anemia. NCBL is concerned that the inability of indigent Black women to choose and obtain medically necessary abortions will have an adverse impact on their health and well-being.

FAILURE OF APPELLANT ILLINOIS TO PAY
FOR ALL MEDICALLY NECESSARY MEDICAID
ABORTIONS WILL DAMAGE THE HEALTH OF
INDIGENT PREGNANT WOMEN.

At issue in this case is the ability of poor women to receive medically necessary abortions when they are pregnant and need this service to preserve their health. Medical conditions requiring medically necessary abortions include thrombophlebitis, diabetes, anemia, hypertension, pyelonephritis, malnutrition, cardiovascular disease, sickle-cell anemia, uterine fibroid tumors, ectopic pregnancy, liver disease, and hemorrhage. Appendix at pp. 104-29.

Fact patterns of threatened health damage to pregnant indigent women recur in post-Hyde Amendment cases throughout the country. In Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978), Plaintiff Roe was 23 years old and had intended to carry her pregnancy to term but suffered from hyperemesis gravidarum (excessive vomiting) which is complicated by pregnancy and resulted in an inability to digest food and constant abdominal pain. 464 F. Supp. at p. 490. A second plaintiff was 13 years old and needed an

abortion because her immature pelvis would cause difficult labor and probable internal damage, as well as an increased incidence of pre-eclampsia (toxemia). The third plaintiff had a history of psychiatric problems including hospitalization for attempted suicide, and if her pregnancy were carried to term, it would cause severe psychological damage.

In this case, Appellee JANE DOE is a 38 year old woman who has four children; she has varicose veins. Affidavit of David ZBARAZ, M.D., Appendix at p. 127. Because of her previous pregnancies, continuation of her current pregnancy would have presented a significant medical risk of increasing the varicosity, leading to increased swelling and pain. Appendix at p. 127. This could have required surgery to remove the veins to relieve the swelling and pain; it could also have developed into a blood clot.¹ Appendix at p. 127. Under Illinois' Medicaid policies, the surgery necessary to remove the veins is

1. Appellee DOE in fact had an abortion during a temporary injunction in this case.

reimbursable, but not an abortion to prevent the need for such surgery. However, the pro-childbirth policy that Appellant ILLINOIS claims as the basis of its refusal to fund this medically necessary Medicaid abortion is contradicted by its willingness to fund tubal ligations, for which the sole medical justification is to end the mother's procreative ability.

While DOE's physician, Dr. ZBARAZ, stated that the present condition of medical knowledge foreclosed his stating with certainty that pregnancy would have so exacerbated her varicose veins as to cause severe or long lasting health damage, he did assert that she had a significantly increased risk that these complications would endanger her health. Appendix at pp. 127-128. Thus, he concluded that an abortion was "medically necessary" for her. Appendix at p. 128.

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By contrast, in D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978), plaintiff's physician merely indicated that abortion would be appropriate. As will be discussed subsequently, the states possess an extensive array of administrative devices for determining which abortions are medically necessary and which abortions are nontherapeutic.

Without Medicaid funding, a poor woman cannot afford a safe, medically necessary abortion. In 1977, the average cost of an abortion in the United States was \$285.² On the other hand, the average Aid to Families with Dependent Children (AFDC) grant to an entire family was only \$241 per month.³

2. Abortions and the Poor: Private Morality, Public Responsibility, Alan Guttmacher Institute, 1979, at 27. (Hereinafter Abortions and the Poor).

3. Abortions and the Poor at 27.

In Georgia, Louisiana and Missouri, abortions cost an average of \$220, \$178 and \$211, respectively; on the other hand, AFDC benefits in those states averaged \$104, \$122 and \$154 respectively, per family.⁴

The average cost of an abortion is equivalent to an average welfare family's budget allocation for food for three months or rent for four months.⁵ The AFDC mother whose medically necessary abortion can not be financed by Medicaid faces the stark choice between damage to her own health, of eviction and malnutrition for her children and herself.⁶

4. Abortions and the Poor at 27. See the following abortion cases in these states: Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977), Reproductive Health Services v. Freeman, Slip Op. No. 79-1275, (8th Cir., 1-9-80).

5. Abortions and the Poor at 28.

6. Marilyn Bennett, Director, Center for Family Counseling, Jersey City, New Jersey, Abortions and the Poor at p. 28.

Furthermore, it is not possible for abortion providers to assume the burden of financing these abortions. Providers were already performing approximately 85,000 free or reduced cost abortions for poor women not eligible for Medicaid prior to the passage of the Hyde Amendment.⁷ To make up the deficit caused by those states which already have cut off public funding of abortions, providers would have to increase the number of abortions they subsidize by more than three times. This they cannot do.⁸ Nor can they rely on private charity for financing. Less than 1% of all annual expenditures for personal health care comes from private philanthropy, a decline from 4% in 1950.⁹

Thus, the real effect of the Illinois statute and the Hyde Amendment has been

7. Abortions and the Poor at 28.

8. Abortions and the Poor at 28.

9. Abortions and the Poor at 28.

to deny poor women the choice of abortions which are necessary for medical reasons.¹⁰

Appellants and their amici obstetricians maintain that alternative treatments are available for many of the medical conditions which constitute indications for abortion.¹¹ There is nothing in the record of this case to indicate that such alternatives would be of equal medical efficacy. Assuming arguendo that efficacy, all of these alternatives are predicated upon, inter alia, frequent access to ongoing medical care.¹²

10. "Let us not wait for some white rabbit to pop out of a hat and suddenly bring a bundle of cash onto the dusty living room of a poor family with no money for an abortion, because it is not going to be there." 113 Cong. Rec. S11044 (6-29-77), Sen. Birch Bayh.

11. See, e.g., Brief Amici Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of the Appellants.

12. Appellee Dr. ZBARAZ states that care for high risk pregnancies means being seen by a physician once every two or three weeks for seven months, and once a (continued)

These theoretical alternatives to abortion are predicated upon the availability of physicians to provide these medical alternatives to poor women.

12. Continued.

week thereafter. Affidavit of DAVID ZBARAZ, Appendix at p. 131. Dr. ZBARAZ, however, cautions that even this course of treatment can only somewhat increase a woman's chances for avoiding damage to her health since the course of a patient's illness is not altogether controllable. Appendix at p. 130. Amici obstetricians stress the need for frequent patient-physician contact in alternative treatments. For example, mild toxemia (preeclampsia) may be treated by bed rest on an outpatient basis "provided the woman visits her physician often." Obstetricians' brief at p. 10. Cardiovascular disease in the pregnant patient requires "[f]requent visits to cardiologist and obstetrician/gynecologist." Obstetricians' brief at p. 7. Sickle cell hemoglobinopathy, which afflicts poor Black women, requires "[c]lose observation and frequent visits to a physician." Obstetrician's brief at p. 5. Teenage pregnancy also requires a great deal of prenatal care, while for Von Willebrand's disease (a blood factor disorder), coagulation studies must be performed throughout pregnancy. Obstetricians' brief at pp. 4, 10. For many other kinds of complications, a physician must monitor on a continuous basis the intake of medication and/or diet in her/his pregnant patients. Obstetricians' brief at pp. 9, 11, 12, 13.

However, there is a critical shortage¹³ of primary care physicians, nurse practitioners and physician assistants in poor communities in Illinois and throughout the country.

13. Appellant UNITED STATES, through its Department of Health, Education and Welfare, has defined "health manpower shortage" for primary medical care [42 C.F.R. §5.4, Appendix A, Part I, (1978)] as the following criteria:

"...One of the following conditions prevails in the area (a) It has a population-to-primary care physician ratio of at least 3,500:1; or (b) It has a population-to-primary care physician ratio of less than 3,500:1 but greater than 3,000:1 and has either unusually high needs for primary care or insufficient capacity of existing primary care providers.

"...Primary care manpower in contiguous areas is overutilized, excessively distant, or inaccessible to the population of the area (this includes whether physicians will accept Medicaid patients)."
(continued)

Applying DHEW's criteria, the City of Chicago's Health Systems Agency (HSA) has documented that 31 areas of the city are health manpower shortage areas, of which more than 50% are group 01 areas, representing more than 30% of Chicago's poor population.¹⁴ The Chicago HSA further concluded that most of the poor areas of the city are medically underserved.¹⁵ Furthermore, in analyzing the incidence of high risk pregnancies, three factors were identified by the HSA: the number of births to women under 20 and over 40 years of age, _____

13. (continued)

The degrees of shortage are organized into 4 classifications as follows:

Group 01 - 5,000:1 to no physicians in the area.

Group 02 - between 4,000 to 5,000 (population to physician)

Group 03 - between 3,500 to 5,000:1

Group 04 - between 3,000 to 4,000:1

14. Health Systems Plan for the City of Chicago, 1979-1980, p. VI(C.1)-20.

15. Health Systems Plan, p. IV-29.

the percentage of mothers beginning prenatal care after the first trimester of pregnancy, and the incidence of low birthweight (premature) babies.¹⁶ The highest percentage of births to women under 20, the highest percentage of premature births and the highest percentage of mothers beginning prenatal care after the first trimester occurred in Chicago's poverty areas.¹⁷ The highest rate of infant mortality, which was twice as high for Blacks as for whites, occurred in the poorest areas of the city.¹⁸

These problems are exacerbated by features endemic to Medicaid. First, many licensed physicians do not participate at all in Medicaid.¹⁹ Second, some states impose durational limits on hospital stays and physician

16. Health Systems Plan, p. V-6.

17. Health Systems Plan, p. V-11.

18. Health Systems Plan, p. V-15.

19. Chavkin, D., "Trends in State Administration of Medicaid Programs" (HEW Health Care Financing Administration 1978) pp. xx, 50 (IL.), 120 (N.H.), 125 (N.J.), 168 (UT.).

visits.²⁰ Third, some states do not exercise their option to provide Medicaid coverage to "unborn children," and thus deny Medicaid coverage entirely to the mother for physician's visits and hospital care.²¹

Amici's proposed medical treatment for many of the medical complications at issue requires bed rest.²² Bed rest is simply impossible for an indigent single parent with two small children.²³ Bed rest is equally

20. See for example, Virginia Hospital Assn. v. Kenley, 427 F. Supp. 781 (E.D. Va. 1977) and Data on the Medicaid Program (HEW Health Care Financing Administration, 1979) p. 11 (LA) and Curtis v. Page, No. 79-224 (N.D. Fla. 4-18-79).

21. Burns v. Alcala, 420 U.S. 575 (1975); Chavkin, D., "Trends in State Administration," pp. XXXI (NH, VA). This wholly denies Medicaid benefits during the pregnancy of a single mother with her first child.

22. Brief of Obstetricians at, e.g., pp. 6,7,10.

23. The average AFDC recipient is a single parent with two young children. 1975 Recipient Characteristics Study, DHEW, Social Security Administration, 77-11-777, pt.1, p.1.

impractical for a working mother.²⁴

Most important to a mother with an existing family who faces serious medical complications is that abortions are substantially safer than even normal childbirths. Roe v. Wade, 410 U.S. 113, 149 (1973). What we are dealing with in this case is abnormal childbirth which vastly increases the damage to the mother's health. The stake at issue is the health of the patient. The Illinois statute has for all practical purposes precluded any medical decision based on the mother's health.²⁵

24. 15% of AFDC recipients are employed while on AFDC. 1975 Recipient Characteristics Study, pt. 3, p.3. A recent study analyzes welfare and labor statistics which demonstrate that the average AFDC recipient is a low-wage working mother who is temporarily unemployed. Harrison, B., Welfare Payments and the Reproduction of Low Wage Workers and Secondary Jobs, in Dollars and Sense, (No. 53, Jan. 1980, pp. 12, 13).

25. The Illinois statute violates the purpose of the Medicaid and AFDC programs to assist recipients to attain or retain their capacity for independence and self-support. 42 U.S.C. §§1396, 601.

SUMMARY OF ARGUMENT

Appellant ILLINOIS' restrictions on the availability of Medicaid abortions limits this service to situations where the mother's life is endangered. Amici contend that this restriction violates two separate provisions of Title XIX of the Social Security Act -- the requirement to extend five mandatory medically necessary services to the categorically needy, and the prohibitions against discrimination in the availability of services on the basis of diagnosis or type of illness or condition.

Our brief is divided into three parts: medical necessity, non-discrimination, and whether federal funding limits repeal a state's Title XIX obligations.

II.

TITLE XIX REQUIRES STATES TO PROVIDE ALL MEDICALLY NECESSARY MANDATORY SERVICES.

A. The Statutory History

In Beal v. Doe, 432 U.S. 437, 444-445 (1977), this Court said:

Although serious statutory questions might be presented if a state Medicaid plan excluded

necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a state to refuse to fund unnecessary though perhaps desirable services.

Throughout the Medicaid statutes and the federal regulations, one factor is emphasized and reemphasized -- that of medical necessity. It or its equivalent appears in the enabling act, the state plan requirements, the reimbursement provisions, the definitions and the provisions which set up the mechanism for determining medical necessity at least twenty-two separate times.²⁶

In 1965, Congress established Medicaid:

[The Senate Finance Committee] has now concluded that the overall national problem of adequate medical care for the aged has not been met to the extent desired under existing legislation, [Kerr-Mills program] because of the failure of some States to provide coverage

26. 42 U.S.C. §1396, §1396a(a)(10)(C)(1), (13)(B), (14), (17), (19), (20)(B), (26)(A), (B), (28), (30), (31), (33), §1396b(g), §1396d(a)(vii)(4)(B), (h), §1320c(1), (2), §1320c-4(a)(1), §1320c-5(b), (d), §1320c-9(a)(1), (2), (b)(3), §1320c-20, §1320c-21.

and services to the extent anticipated... a more comprehensive Federal program as to both persons who can qualify and protection afforded is required. Sen. Rept. No. 404, 89th Cong., 1st Sess. (1965), reprinted in 1 U.S. Code Cong. & Admin. News 1943, 1964. (emphasis added).

Congress required participating states to extend the basic five mandatory services^{26A} to all categorically needy aged, disabled, blind and dependent children welfare recipients. 42 U.S.C. §1396a(13). This differed from the Kerr-Mills program in which the states were required to provide only "some institutional and some non-institutional" care.²⁷

Amici states contend that nowhere does Title XIX require the states to extend all medically necessary care even within the mandatory service categories. Amicus brief of Commonwealth of Massachusetts (hereinafter "amici states") at

26A. Inpatient and outpatient hospital services, x-ray and laboratory services, physician services, skilled nursing care.

27. Sen. Rept. No. 404, 89th Cong., 1st Sess. (1965), reprinted in 1 U.S. Code Cong. & Admin. News 1943, 1950.

pp. 10-43. In fact, as far back as 1960 in the House Report on H.R. 12580, the Kerr-Mills bill, the House stated:

2. Services provided

Medical services eligible for Federal participation are defined in the new title to include, when determined by a physician to be medically necessary, inpatient hospital services with Federal participation in the costs...skilled nursing home services; physicians' services; outpatient hospital services... House Rept. No. 1799, 86th Cong., 2d Sess. (1960), 7.²⁸

In 1965 Congress curtailed the states' discretion in the Kerr-Mills program by requiring an irreducible minimum of five basic service categories. 42 U.S.C. §1396a(a)(13)(B),(C)(i). While Congress gave the states the option to the extent practicable under the conditions of each state to include the optional medically needy eligibles and the optional services, 42 U.S.C.

28. Kerr-Mills, as did Title XIX, transposed "medically necessary care" into the phrase, "necessary medical services" in the actual wording of the statute. 42 U.S.C. §1396 (Medicaid); 42 U.S.C. §301 (1960) (Kerr-Mills).

§1396a(a)(10) and (13), the states were required during the period from 1965 to 1975 to make progress towards a comprehensive medical assistance program of all the optional eligibles and all the optional services, including preventive and rehabilitative care. 42 U.S.C. §1396a(d)(repealed).²⁹

By 1972, the states had convinced Congress that progress toward a comprehensive medical assistance program was wreaking such fiscal havoc on their budgets that they were exempted from the requirement to provide eventually all optional services and all optional eligibles. Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (1972), 202.

They were not, however exempted from the requirement to provide all medically necessary mandated services to the categorically needy. Instead, Congress created an elaborate series of mechanisms

29. In 1969, the states were given a two year extension on the requirement for covering all the optional eligibles and services. Sen. Rept. No. 91-222, 91st Cong., 1st Sess. (1969), reprinted in 1 U.S. Code Cong. & Admin. News 1077, 1082.

to allow the states to control the provision of medically unnecessary services. These mechanisms are known as prior approval, Professional Standards Review Organizations (PSROs) and Utilization Review (U.R.).³⁰ What is common to each of these mechanisms is reliance upon the professional judgment of physicians to control the over-utilization of services by their peers. The judgment that these physicians were to exercise was whether the service was "medically necessary":

[T]he PSRO's responsibilities are confined to evaluating the appropriateness of medical determinations so that Medicare and Medicaid payments will be made only for medically necessary services which are provided in accordance with professional standards of care. Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (1972), 261.

Thus, the tension between progress toward a comprehensive program and assuring an irreducible minimum of

30. 42 U.S.C. §1396a(a)(30), (31), (33), §§1320c, 1320c-21, §1396b(g). These statutes are riddled with the concept of medical necessity.

services was resolved in the PSRO legislation in favor of providing only medically necessary services in the mandated service categories to the mandatory eligibles³¹ (though a state was still free to include optional services and eligibles if it so desired). The Committee was convinced that effective utilization control techniques would be sufficient to preserve the integrity of the basic five service categories:

...in hearings conducted by the sub-committee on medicare and medicaid [w]itnesses testified that a significant portion of the health services provided under medicare and medicaid are probably not medically necessary. ... Aside from the economic impact . . . [u]nnecessary hospitalization and unnecessary surgery are not consistent

31. It is instructive to note two other 1972 changes. First, while the states were given the authority to impose cost sharing, they were forbidden to do so on the mandatory services to the mandatory eligibles. 42 U.S.C. §1396a(a)14(A). Secondly, state expenditures for mental health which were not originally covered under Medicaid were given a financial bailout but only on the express condition that services extended were medically necessary to improve the patient's condition. 42 U.S.C. §1396d(h).

with proper health care. Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (1972), 254.

The statutory requirement to provide all medically necessary mandated services does not mean that a state Medicaid program must pay for every form of medical care available under the mandatory services. For example, most forms of preventive care, routine check-ups, and the like are mandated for children under 21 (EPSDT), but are wholly optional for adults. 42 U.S.C. §1396d(a), 42 C.F.R. 440.50 and .130(C)(4) and (13). Nor does this require the states to pay for all forms of cosmetic, elective, and unnecessary surgery.³² Instead, the states are required and authorized to implement controls over surgery which is not medically necessary.³³

32. Medical Society of New York v. Toia, 560 F.2d 535 (2d Cir. 1977).

33. Cost and Quality of Health Care: Unnecessary Surgery, Report by the Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, 94th Congress, 2d Sess., (1976) pp. 18-26; 42 U.S.C. §1396a(a)(30).

B. The Case Law

Amici will examine four relevant lines of authority. The first line of authority holds that Medicaid programs must cover at least medically necessary care for the mandatory services.³⁴

34. Pennsylvania Welfare Rights Organization v. Shapp, 602 F.2d 1114 (3d Cir. 1979) [EPSDT Orthodontia services]; Doe v. Kenley, 584 F.2d 1362 (4th Cir., 1978) [abortion]; Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), 522 F.2d 928 (2d Cir. 1975) [dissenting opinion on abortion] rev'd on other grounds sub nom Maher v. Roe, 432 U.S. 464 (1977); Doe v. Beal, 523 F.2d 611 (3d Cir. 1975) [abortion] rev'd on other grounds sub nom Beal v. Doe, 432 U.S. 438 (1977); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979) [abortion]; Doe v. Pickett, Slip Op. No. 79-322H, (S.D.W.Va. 11-30-79) [family planning]; Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) [abortion]; Rush v. Parham, 440 F. Supp. 383 (N.D. Ga. 1977) [transsexual surgery]; Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976) [abortion]; Roe v. Ferguson, 389 F. Supp. 387 (S.D. Ohio 1974) [abortion] rev'd on other grounds, 515 F.2d 279 (6th Cir. 1975); Smith v. Vowell, 379 F. Supp. 139 (W.D. Tex. 1974) [transportation]; Morris v. Williams, 67 Cal.2d 733, 63 Cal. Rptr. 689 (1967) [cutback in physicians' and hospital services]; Curtis v. Page, Slip Op. No. 79-2244 (N.D. Fla. 4-18-79) (continued)

The second line allows the states to draw an across-the-board standard for the mandatory services at somewhat less than all medically necessary care, provided that all diagnoses and conditions are treated equally.³⁵ In the third

34. continued
[physicians' services]; Monmouth Medical Center v. State of New Jersey, 80 N.J. 299 (N.J. Sup. Ct. 1979) [long-term hospital stays]; Right to Choose v. Byrne, 169 N.J. Super. 543 (N.J. Super. Ct. 1979) [abortion]; Ferro v. Lavine, 79 Misc.2d 431 (Sup. Ct., NY. Chenango Cty. 1974) [sterilization]; G.B. & J.D. v. Lackner, 80 Cal.App.3d 64 (1978) [transsexual surgery]; Doe v. State Dept. of Public Welfare, 257 N.E.2d 816 (Minn. 1977) [transsexual surgery]; Pinneke v. Preisser, CCH Medicare-Medicaid Guide, ¶29,756 (N.D. Iowa 1979) [transsexual surgery]; Kleinwachter v. Dept. of Health & Social Services, CCH Medicare-Medicaid Guide, ¶27,383 (Dane County, Wis. Cir. Ct., 4/8/75) [mammary reconstruction]; Brooks v. Smith, 356 A.2d 723 (Me. 1976) [EPSDT Orthodontia services].

35. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979) [abortion]; Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979) cert. denied U.S. , 99 S. Ct. 2181-2 (1979) [abortion]; White v. Beal, 555 F.2d 1146 (3d Cir. 1977) [eyeglasses]; Roe v. Norton, 522 F.2d 928 (2d Cir., 1975) [abortion] (continued)

line of cases, plaintiffs failed to show that Medicaid recipients were being denied medically necessary care; these are hereinafter referred to as the reimbursement cases.³⁶ The fourth

35. continued

rev'd on other grounds sub nom Maher v. Roe, 432 U.S. 464 (1977); Simpson v. Wilson, Slip Op. No. 77-261 (D. Vt. 10-26-79); Frieman v. Walsh, Slip Op. No. 77-4171-CV-C (W.D. Mo. 1-26-79) [abortion] rev'd on other grounds sub nom Reproductive Health Services v. Freeman, Slip Op. No. 79-1275 (8th Cir. 1-9-80); Lady Jane v. Maher, 420 F. Supp. 318 (D. Conn. 1976) [abortion]; Denise R. v. Lavine, 347 N.E.2d 893 (N.Y. Sup. Ct. 1976) [transsexual surgery]; Hodgson v. Bd. of County Commissioners, Slip Op. No. 79-1665 (8th Cir. 1-9-80) [abortion: straddles both first and second lines of authority]; Women's Health Services v. Maher, Slip Op. No. H-79-405 (D. Conn. 1-7-80) [abortion].

36. DR v. Mitchell, 456 F. Supp. 609 (D. Utah 1978) [abortion]; Virginia Hospital Assn. v. Kenley, 427 F. Supp. 204 (E.D. Va. 1977); Metropolitan Hospital v. Pennsylvania, 21 Pa. Commonwealth 116 (1975); Penn. Dept. of Public Welfare v. Temple University, CCH Medicare/Medicaid Guide ¶27,589, 21 Pa. Commonwealth 162 (9/8/75); Idaho Corp. of the Benedictine Sisters v. Marks, CCH Medicare/Medicaid Guide ¶29,768 (D. Ida. 8/29/73); District of Columbia Podiatry Society v. District of Columbia, 407 F. Supp. 1259 (D. D.C. (continued)

concerns the scope of, and mechanisms for determining medical necessity.³⁷

The decisions holding that the states must at an irreducible minimum provide

36. continued

1975). These cases are best understood by realizing that 1) they were reimbursement cases and 2) there was no showing that any Medicaid patient was being denied or being forced to pay out of pocket for a medically necessary mandatory service. Contrast, for example, the results in the Monmouth Medical Center case, where the Court found that medically necessary care would be denied unless reimbursement for administratively necessary days was ordered, with the holding in Temple University: "The Medical Assistance Program in which Temple has agreed to participate obligates the hospital to provide non-reimbursable care after the expiration of the 60 day benefit period and thus no medically necessary care was denied to its patients." CCH Guide ¶27,589 at 10,422. Similar lack of evidence of the denial of medically necessary care underlies the findings in Kenley, 427 F. Supp. at 783, D.C. Podiatry Society, 407 F. Supp. at 1265 n.27 and 1268 n.43, and DR v. Mitchell, 456 F. Supp. at 610.

37. Doe v. Bolton, 410 U.S. 179, 192 (1973); Drennan v. Harris, 606 F.2d 846 (9th Cir., 1979); Medical Society of New York v. Toia, 560 F.2d 535 (2d Cir., 1977); Mount Sinai Hosp. v. Weinberger, 517 F.2d 329 (5th Cir. 1975) rev'g in (continued)

medically necessary services to the categorically needy are based on the following grounds: (1) the pervasive use of the phrase medical necessity or its equivalent throughout the statutory framework,³⁸ (2) the common antecedents of the Medicare and Medicaid programs in requiring medically necessary care,³⁹

37. continued

part 376 F. Supp. 1099 (D. Fl. 1974); Szekely v. Florida Medical Assn., 517 F.2d 345 (5th Cir. 1975); Hultzman v. Weinberger, 495 F.2d 1276 (3d Cir. 1974); McMahon v. Califano, 476 F. Supp. 978 (D. Mass. 1979); Greater New York Hosp. Assn. v. Blum, 476 F. Supp. 234 (E.D.N.Y. 1979); Public Citizen Health Research Group v. H.E.W., 449 F. Supp. 937 (D. C. 1978); Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977); Westgard v. Weinberger, 391 F. Supp. 1011 (D. N.D. 1975); Allen v. Richardson, 366 F. Supp. 516 (E.D. Mich. 1973); Price v. Putnam, Slip Op. No. 1288 (Or. Ct. App. 4-18-79); Smith v. Trainor, Slip Op. No. 76 C 526 (N.D. Ill. 10-19-79).

38. E.g., Roe v. Casey, 464 F. Supp. 487.

39. E.g., Roe v. Norton, 591 F.2d at pp. 931-2, 935 n.5, 939-40 (dissenting opinion); Medicare and Medicaid share a common requirement of covering medically necessary services, see Turecamo v. Commr., Internal Revenue, 554 F.2d 564, 572-5 (2d Cir. 1977).

(3) the use of the phrase medical necessity or its equivalent in the Medicaid regulations,⁴⁰ (4) the 1972 amendments' reaffirmation of the states' duty to maintain the integrity of the basic five services for the categorically needy,⁴¹ (5) the overwhelming concern for preserving the autonomy of the patient-physician relationship from review by non-physician bureaucrats.⁴² As previously discussed, these concerns are well born out by the legislative history of the program.

Appellants and amici states base their argument that they may choose out of the mandatory services the conditions and treatments which they wish to provide on the following: (1) the phrase "as far practicable under the conditions of the state" which appears in the appropriations statute, (2) the phrase "reasonable standards...for determining

40. E.g., Preterm v. Dukakis, 591 F.2d 121.

41. E.g., Doe v. Beal, 523 F.2d 611.

42. E.g., Doe v. Busbee, 471 F. Supp. 1326; Rush v. Parham, 440 F. Supp. 383.

...the extent of medical assistance under the plan" in §1396a(a)(17), (3) the phrase "part or all of the cost of the following services," §1396d(a), (4) the notion that "medical necessity" ought to be subject to revision by state legislatures. In all of these arguments they are mistaken.

In 1965 the states were mandated to cover the basic five services for the categorically needy and given the option of covering the optional services, the optional eligibles, and preventive care for adults "as far as practicable under the conditions in the state" with the proviso that by 1975, regardless of the practicability of conditions in their state, they were mandated to provide comprehensive care to both mandatory and optional eligibles. 42 U.S.C. §1396a(a)(13)(B), (C), §1396b(e), §1396d(a)(vii)(6-17).⁴³ That is, by 1975 they were required to provide both medically necessary as well as preventive and

43. Sen. Rept. No. 91-222, 91st Cong., 1st Sess., (1969), reprinted in 1 U.S. Code Cong. & Admin. News 1077, 1081.

rehabilitative care. The phrase "as far as practicable under the condition of the state" was not intended to modify the mandatory requirement to cover the basic five services, but rather to modify the state's obligation to progress from the irreducible minimum to a program of comprehensive care. This reading is reinforced by the congressional actions of 1972 which (1) lifted the requirement to provide a program of comprehensive care to the optional eligibles, (2) did not tamper with the obligation to provide the irreducible minimum to the categorically needy, and (3) provided the states with the mechanisms and obligation to sort out medically necessary from medically unnecessary care among the mandatory services. 42 U.S.C. §1396a(a)(13)(B), (C), (31), (33), §1396b(e), (g), §1320c et seq.

The phrase "reasonable standards ... for determining ... the extent of medical assistance under the plan" has been read variously as having no meaning since it appears in a paragraph concerned with setting the standards for eligibility, or as granting broad discretion to the state

by the use of the words "reasonable" and "objectives of the Act." It is true that 1396a(a)(17) is principally concerned with the setting of income eligibility, and its implementation is found at 42 C.F.R. 435.3 et seq. However, it also governs a state's decisionmaking on the extent of services,⁴⁴ and its "reasonableness" language is the basis for the regulatory prohibition against discriminations in mandatory service categories based on diagnosis, type of illness or condition, and that the scope of each optional service must be reasonably sufficient to achieve its purpose.⁴⁵ 42 C.F.R. 440.230(b). However, it is a profound misunderstanding of the language to read the phrases "reasonableness" and "objectives of the Act" and "as far as practicable" together as the First Circuit did in Preterm v. Dukakis, 591

44. 42 U.S.C. §1396a(a)(17) provides in part the statutory basis for 42 C.F.R. 440.230 with regard to comparability of services.

45. Solicitor General's brief at pp. 43-44, n. 23.

F.2d at 124-5, to give the states discretion to invade the integrity of the five basic "medically necessary" services for the categorically needy. The objective of Medicaid was to over-ride the states' prior history of not providing medically necessary basic services to the categorically needy and to ensure that out of their subsistence incomes, welfare recipients would not have to pay for the costs of medically necessary care in the five basic services.⁴⁶ If the statutory interpretations espoused by amici states and the First Circuit are adopted, we will soon see state efforts, similar to those enjoined in Curtis v. Page, Slip Op. No 79-2244, where Florida attempted to limit all physicians' services to care necessary to save life or limb -- an approach that was rejected by

46. See 42 U.S.C. §§1396a(a)(14)(A) and 1396a(c) and 42 C.F.R. 447.15 and 447.53; Crane v. Mathews, 417 F. Supp. 532 (N.D. Ga. 1976).

Congress⁴⁷ and by this Court,⁴⁸ and strongly criticized by the First Circuit.⁴⁹

The phrase "sufficient ... to reasonably achieve their purpose" in 42 C.F.R. 440.230 must also be read in context. It applies to optional services as well as to the mandatory services. Some of the optional services, e.g., podiatrists' services, are inexpensive alternatives to higher cost mandatory services. A state could properly, pursuant to the purposes of §1396a(a)(30), provide podiatrists' care for certain services because it is cost-efficient, while restricting its availability for others, provided that medically necessary care is available from either a physician or a podiatrist.⁵⁰ An abortion,

47. See earlier discussion of legislative history.

48. Memorial Hospital v. Maricopa County, 415 U.S. 250, 260-1 (1974).

49. Preterm v. Dukakis, 591 F.2d at 126.

50. District of Columbia Podiatry Society v. District of Columbia, 407 F. Supp. at 1265, n. 27, 1268, n.43.

however, can be performed only by a physician, whose judgment on medical necessity is to be reviewed only by other physicians within the utilization control framework. The Illinois legislature has sought to interfere with that professional judgment by limiting it to only one factor, life endangerment; this is not sufficient to reasonably achieve the purpose of protecting a woman's health.

The phrase "part or all of the cost of the following services," appearing in 42 U.S.C. §1396d, is relied on by the amici states to argue that they can pay none of the cost of a treatment falling into one of the mandatory categories. This fails to read the statute as a whole. "Part or all" refers to (1) the state's authority to impose cost-sharing on all services to the optionally needy and (2) the states' obligation to treat income flexibly by granting a deduction in determining eligibility for incurred medical expenses (i.e., a "spenddown").⁵¹

51. See Sen. Rept. No. 404, 89th Cong., 1st Sess. (1965), reprinted in 1 U.S. Code Cong. & Admin. News 1943, 2018; 42 U.S.C. §1396a(a)(14)(A), (17)(D).

Lastly, amici states contend that the resolution of medical necessity in this case could bind state legislatures' efforts to control Medicaid costs.⁵²

However, (1) Congress did require states to make a commitment to provide the irreducible minimum of five basic services to the categorically needy, (2) Illinois' and the amici states' interpretation of the statute makes an absolute nullity of that commitment and (3) Congress has mandated the states to set up three separate programs to control medically unnecessary utilization of the mandatory services.

It is important to seek to understand what medical necessity is and how it is determined. In D.R. v. Mitchell, 456 F. Supp. 609, Judge Anderson stated that it was such an elusive and meaningless⁵³ concept that it could not have been

52. See, e.g., Amicus brief of the State of New Jersey at pp. 1-2.

53. American Association of Physicians and Surgeons v. Weinberger, 395 F. Supp. 125,138 (N.D. Ill. 1976) found that "medically necessary" was not a unconstitutionally vague concept.

imposed as a requirement of the Medicaid statutes, thereby ignoring the twenty-two times it or its equivalent is mentioned. By contrast, this court stated in Doe v. Bolton, 410 U.S. 179, 192, (1973) that "whether an abortion is necessary is a professional judgment that may be exercised in the light of all factors -- physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient...[t]his allows the attending physician the room he needs to make his best medical judgment." Medical necessity is in reality good, sound, conservative medical practice. It is a term of art given definition with increasing certitude through the experience of the PSROs, U.R. Committees, and the medical committees of the fiscal intermediaries in applying it to bills submitted for payment in the Medicaid and Medicare programs.⁵⁴

These utilization criteria must be developed after studies and "analysis of patterns of patient care"; they are developed by health professionals relying

54. 42 U.S.C. §1320c-20(a)(1).

on the professional health care literature and their own expertise; they must be based on "regional medical care appraised norms" which are "numerical or statistical measures of usually observed performance," 42 C.F.R. 456.51(b) and .141. Their application is done after review of the patient's records and in long term care in conjunction with periodic inspections of the facility and personal contact with the patient. 42 C.F.R. 456.111 and 456.608. In short, the assessments of medical necessity are scientific and professional; they are based on actual patient experience. Furthermore, they are evolutionary, reflecting the state of the art at any given point in time and removing "outliers" -- practitioners or institutions with abnormal practice patterns reflecting over-utilization.

The state agency is held at arm's length from the determination of medical necessity. 42 C.F.R. 456.6, 463.10. In fact the determination of medical necessity is binding on the state agency, unless it is an uncovered individual or uncovered service. 42 C.F.R.

463.16(C)(1), 463.27. Furthermore, fiscal constraints are not a permissible ground for denial of coverage. Price v. Putnam, Slip. Op. No. 1288; Mead v. Burdman, CCH Medicare Medicaid Guide ¶28,957 (King Cty. Super. Ct., Wash. 3/20/78).

Since Congress was concerned with minimizing the intrusive effect of government financing into the private patient-physician relationship,⁵⁵ federal and state efforts to displace the PSRO determination either by state personnel or administrative rule-making have generally not been successful. Greater New York Hosp. Assn. v. Blum, 476 F. Supp. 234 (E.D.N.Y. 1979), McMahon v. Califano, 476 F. Supp. 978 (D. Mass., 1979), Allen v. Richardson, 366 F. Supp. 516 (E.D. Mich. 1973). The state effort to regulate the medical criteria for funding abortions is a harbinger of state efforts to withdraw both the criteria and treatment for a variety of other medical conditions from the province of the PSRO where it was placed by Congress.

⁵⁵ Sen. Rept. No. 92-1230, 92d Cong., 2d Sess. (1972), 246; Turecamo v. Comr. of Internal Revenue, 554 F.2d 564.

III

RESTRICTIONS ON THE AVAILABILITY OF
SERVICES MUST BE BASED ON ACROSS-
THE-BOARD STANDARDS DRAWN IN AN EVEN-
HANDED FASHION WITHOUT DISCRIMINATION
BASED ON DIAGNOSIS, TYPE OF CONDITION
OR ILLNESS.

The federal regulations prohibit states from discriminating in their provision of services based on diagnosis or type of condition. They provide in relevant part:

(1). The medicaid agency may not arbitrarily deny or reduce the amount, duration or scope of a required service under §§440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness or condition.

(2) The agency may place appropriate limitations on a service based on such criteria as medical necessity or on utilization control procedures. 42 C.F.R. 440.230(c).

Physicians and hospital services are mandatory services under 42 C.F.R. 440.10,.20,.50, and .210. Restrictions on abortion funding to situations where the mother's life is endangered are reductions in the amount or scope of a service based solely on diagnosis or type of condition.⁵⁶

56. See cases cited in notes 34 and 35.

Prohibitions against discrimination on the basis of type of condition were first elucidated by HEW in 1966 in the Handbook of Public Assistance Administration, Supplement D, based on statutory requirements.⁵⁷

The Illinois restrictions at issue mean that a woman suffering phlebitis can have a sterilization one day prior to discovering she's pregnant, but one day after this discovery, she cannot have an abortion to preserve her health. She can give up her entire childbearing capacity but not a single pregnancy that would damage her health.

Illinois' policy cannot be justified as based on "medical necessity or on utilization control procedures." 42 C.F.R. 440.230(c)(2). Furthermore, the phrase "medical necessity" was inserted into this regulation in 1974 after HEW

57. 42 U.S.C. §1396a(a)(17) requires the states to use reasonable standards for determining the extent of medical assistance. Section 1396a(a)(19) requires administration in the best interests of recipients. Section 1396a(a)(10) prohibits discrimination in the extent of services between groups of eligibles.

had extensive experience with its meaning as applied by U.R. Committees, fiscal intermediaries and PSROs. In none of these contexts does it have anything in common with Illinois' standard, "life threatening". The further deficiency in the Illinois statute is that it does not turn over the decision as to which abortions are medically necessary to medical peer review groups, as required in the federal statutes and regulations.

The reasoning of the First, Third, Seventh and Eighth Circuits requires a holding that Illinois' abortion policy violates federal regulations. In Preterm v. Dukakis, 591 F.2d 121, the First Circuit held that while the state had latitude to set the degree of medical necessity for which it would reimburse, it could not vary the degree of medical necessity based on the particular kind of medical condition being treated. See also Zbaraz v. Quern, 596 F.2d 196; Hodgson v. Bd. of County Commissioners, Slip. Op. No. 79-1665. Similarly, in White v. Beal, 555 F.2d at 1151, where Pennsylvania limited its optional

eyeglasses program to persons suffering eye disease but not to persons suffering from equally poor vision due to genetically poor eyesight, the Third Circuit held:

We find nothing in this federal statute that permits discrimination based upon etiology rather than need for the service ... The state plan's classification is arbitrary since it is based upon a factor not reasonably related to medical need ... [T]he service must be distributed in a manner which bears a rational relationship to the underlying federal purpose of providing the service to those most in need of it. (emphasis added)

Under this approach (and disregarding for the moment the requirement to provide all medically necessary mandated services), Illinois cannot restrict the availability of abortions to life-threatening situations unless it is willing to restrict all of its hospital and physician's services and arguably all of the other mandatory and optional services to a comparable standard.

IV.

THE WITHDRAWAL OF FEDERAL FUNDING FOR
A SERVICE IS NOT TANTAMOUNT TO A PRO
TANTO REPEAL OF THE MEDICAID
STATUTES.

The overall question is best posed as follows: Can a state escape its obligations under Title XIX simply because there is or is not a particular amount of federal funding forthcoming? Amici contend the answer should be "no". A series of broader policy disputes are involved in this answer among Congress, HEW and the states in the following: closing of nursing homes due to life, safety and code violations,⁵⁸ enforcement of utilization review,⁵⁹ enforcement of children's services (EPSDT),⁶⁰ payment of old claims,⁶¹ Medicare buy-ins,⁶²

58. Feld v. Berger, 424 F. Supp. 1356, 1357 (S.D.N.Y. 1976).

59. 42 U.S.C. §1396b(g).

60. 42 C.F.R. 441.70; 45 C.F.R. 201.14(a)(3).

61. 42 C.F.R. 447.45(d)(4), 431.250(e).

62. 42 U.S.C. §1396b(b)(1); 42 C.F.R. 449.41(c); GAO Report H.R.D. 79-96, Simplifying the Medicare-Medicaid Buy-In Program, 1979.

error rates,⁶³ requirements to assure transportation and emergency medical care,⁶⁴ due process notice and hearing guarantees⁶⁵ and the like.

Generally, federal funding is used as both a carrot and stick by Congress and HEW; the states' contention is that it may be used only as a carrot, and that each activity required of the states must be scrutinized for its impact on federal medical assistance percentage.⁶⁶

Federal financial participation (FFP) is a patchwork quilt of variable funding percentages.⁶⁷ For example, most

63. 42 U.S.C. §603(j); 42 C.F.R. 438.801.

64. 42 C.F.R. 431.53; DHEW Medical Assistance Manual 6-20-00(B-E); 45 C.F.R. 206.10(a)(5); 42 C.F.R. 435.930.

65. 44 C.F.R. 435.1003; Stenson v. Blum, Slip. Op. Civ. No. 78-6044 (S.D.N.Y. 9-18-79);

66. 42 U.S.C. §1396b(a)(1); 42 C.F.R. 433.10(b).

67. The descriptions and limitations on FFP are found at 42 C.F.R. 431.591, .592, and .597; 432.50; 433.10, .15, .112-.114; 435.1001-.1011, 440.21; 441.11 and .13; 447.35 and .252.

services are funded at ratios from 50 to 83%,⁶⁸ depending on the comparative wealth of the state. However, transportation services are funded at 0 to 90%, depending on the state's choice of how to provide transportation.⁶⁹

Moreover, in the Medicare buy-in amounts for the medically needy, the states must use 100% state funds and failing that, they will be docked the entire FFP for the services for which they failed to buy-in.⁷⁰ By way of contrast, family planning services are funded at 90%,⁷¹ and services to a decertified nursing home are funded at 0%.⁷²

Administrative costs are funded at rates ranging from 50% to 100%, depending on the activity being performed.⁷³

68. 42 C.F.R. 433.10(b).

69. DHEW Medical Assistance Manual 6-20-00 (C-E).

70. 42 U.S.C. §§1396a(a)(15), 1396b(b)(1); 42 C.F.R. 431.625.

71. 42 C.F.R. 433.15(c)(1).

72. 42 C.F.R. 441.11.

73. 42 C.F.R. 432.50, 433.15.

Inspections of nursing homes receive 100% reimbursement.⁷⁴ personnel involved in developing mechanized claim processing or family planning services receive 90%.⁷⁵ skilled professional medical personnel and managers of the claims processing systems qualify for 75% reimbursement, while skilled non-medical personnel qualify for only 50% reimbursement.⁷⁶

Additionally, there are at least three separate areas where Congress and HEW have threatened to reduce federal funding dramatically if the states fail to 1) run adequate utilization review programs, 2) comply with EPSDT requirements and 3) reduce their error rates.⁷⁷ Many states have contended (and some are currently suing HEW) that the federal medical assistance percentage is inviolate.

74. See n.73.

75. See n.73.

76. 42 C.F.R. 432.50; 433.15.

77. 42 U.S.C. §1396b(g), §603(f), (g), (j).

Turning to some specific examples where the state can properly assert that the FFP is 0, the question must be posed whether the lack of FFP relieves the state's obligations. If this Court adopts the position of Appellant ILLINOIS and the amici states, the necessary implication militates toward the states' being relieved of their obligations in the following examples:

Example 1

The 12 month time limit for FFP⁷⁹ in Medicaid bill payment has lapsed. Its lapse is due to either litigation, oversight by the state, or mistake of the provider, recipient or the state. Is the state relieved of its obligation to pay the provider's bill, or alternatively to hold the recipient harmless from the provider's efforts to collect the bill?

Example 2

The state has chosen to fulfill its obligation to assure transportation to medical providers by using other federal and state transportation funds available from the Department of Transportation at a better matching rate.⁸⁰ Is it

79. 42 C.F.R. 447.45(d)(4), 431.250(e).

80. DHEW Medical Assistance Manual 6-20-00(C)p.7.

relieved of its medical obligations to HEW and the recipient to assure high quality care and/or to assure that the recipient is not billed for service?

Example 3

The state is obligated to assure Medicaid applicants emergency medical care on a 7 days a week, 24 hours a day basis. The state has chosen not to provide the optional service of emergency medical care in hospitals not participating in Medicaid.⁸¹ The patient is in a car accident and is treated at the nearest hospital which does not participate in Medicaid. After the application is approved, is the state obligated to pay the hospital bill or otherwise hold the recipient harmless against suit by the hospital?

Example 4

On termination of a Supplemental Security Income (SSI) recipient's benefits, the state agency has a limited number of days of FFP in which to conduct an investigation of ongoing Medicaid eligibility and send, if appropriate, a notice of reduction or termination of assistance.⁸² When the state is unable to accomplish its tasks within the time limits due to

81. 42 C.F.R. 440.170(e), 431.52(b).

82. 42 C.F.R. 435.1003.

inadequacies of administrative structures in HEW and the state, is it relieved of its obligations under federal regulations and the Constitution to afford proper redetermination and notice procedures?⁸³

Example 5

HEW orders a nursing home to be suspended from Medicare, which also terminates FFP under Medicaid within 2 months.⁸⁴ Due to the shortness of time, the state is unable to make adequate arrangements for the safe transfer of all the patients within the time limits for FFP. Is the state thereby relieved of any obligation for the patients' safe transfer and for the nursing home's costs in the interim?

What we are suggesting by these examples is that a state's obligation under the Medicaid program is not tied to whether it receives funding for any particular activity, but rather to its decision to participate in the Medicaid program and thus to accept the vagaries and approximations of overall federal funding

⁸³. See Stenson v. Blum, Civ. No. 78-1044 (S.D.N.Y. 9-18-79).

⁸⁴. 42 C.F.R. 441.11. See Feld v. Berger, 424 F. Supp. 1356.

for medically necessary care to its indigent population. In so doing, it sometimes receives 0% in FFP as in the examples cited above and as in other examples cited in appellees' brief, while in other contexts it receives 100% federal funding. These are the extremes; yet when viewed on an over-all basis, the state receives extremely generous federal funding to fulfill its historic duty to provide for its indigents.⁸⁵

CONCLUSION

Amici urge this court to guarantee the right of the indigent pregnant mother and her doctor to reach a decision as to the most appropriate medically necessary treatment of her condition, free from the intrusion of the medically untrained judgments of state welfare officials and legislators. Amici urge this Court to affirm the Seventh Circuit's holding that state restrictions on the availability of medically necessary abortions violate Title XIX and federal regulations, and to reverse the holding of the Seventh

⁸⁵. McRae v. Mathews, 421 F. Supp. 533, 537 (E.D. N.Y. 1976); Amici states' brief at p. 29.

Circuit that withdrawal of federal funding in the amount of less than .2% of Illinois' Medicaid budget is tantamount to a pro tanto repeal of the state's substantive obligations under Title XIX and the implementing federal regulations. Amici further urge this Court to affirm the holding of the District Court that Illinois' singular denial of funding for medically necessary abortions, while funding all other comparable medically necessary care, violates the Equal Protection Clause of the Fourteenth Amendment.

In reaching its decisions on these issues, amici urge that this Court consider carefully the impact of its holding on some of the myriad of issues not before this court involving the same and similar statutory provisions - state cutbacks in hospital and physician mandatory services, state cutbacks in prescription drugs and eyeglasses and other optional services, state denials of orthodontia and other medically necessary care to children under the EPSDT programs, state failures to assure transportation to necessary medical services,

and state failures to assure emergency medical care for applicants and recipients.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
v. *Appellants*
DAVID ZBARAZ, *et al.*,
Appellees

No. 79-5

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS
DEPARTMENT OF PUBLIC AID,
v. *Appellant*
DAVID ZBARAZ, *et al.*,
Appellees

No. 79-491

UNITED STATES OF AMERICA,
v. *Appellant*
DAVID ZBARAZ, *et al.*,
Appellees

On Appeals from the United States District Court
for the Northern District of Illinois

BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC., ASSOCIATION
OF PLANNED PARENTHOOD PHYSICIANS, INC.,
AMERICAN PUBLIC HEALTH ASSOCIATION,
NATIONAL ABORTION FEDERATION, AMERICAN
ASSOCIATION OF SEX EDUCATORS, COUNSELORS
AND THERAPISTS, SOCIETY FOR ADOLESCENT
MEDICINE, ASSOCIATION FOR WOMEN IN
PSYCHOLOGY, NATIONAL URBAN LEAGUE, INC.,
THE AMERICAN JEWISH CONGRESS, AND CERTAIN
MEDICAL SCHOOL DEANS, PROFESSORS AND
INDIVIDUAL PHYSICIANS
IN SUPPORT OF THE APPELLEES

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INDEX

	Page
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I. THE DISTRICT COURT CORRECTLY FOUND THAT THERE IS A CLASS OF INDIGENT WOMEN FOR WHOM ABOR- TIONS ARE MEDICALLY NECESSARY AND THAT THE STATE'S DENIAL OF ABOR- TION FUNDING FOR SUCH WOMEN WILL SUBSTANTIALLY INCREASE MORBIDITY AND MORTALITY AMONG THE WOMEN IN THIS CLASS	10
A. There Exists A Class Of Indigent Women For Whom Abortions Are Medically Nec- essary	11
1. Both pre-existing conditions and compli- cations that arise during pregnancy may pose excessively high risks	14
2. Teenage pregnancy poses particularly serious health problems	22
B. The Illinois Statute Will Make Publicly Funded Abortions Unavailable To A Signifi- cant Number Of Indigent Women For Whom Abortions Are Found To Be Medically Necessary	24
C. The Effect Of The Illinois Statute Will Be To Increase Morbidity And Mortality Among Indigent Pregnant Women	26
II. ILLINOIS' REFUSAL TO FUND MEDICALLY NECESSARY ABORTIONS VIOLATES THE EQUAL PROTECTION CLAUSE	29

INDEX—Continued

	Page
A. The Illinois Statute Should Be Subjected To Strict Scrutiny	31
B. The Illinois Statute Does Not Further A Compelling State Interest	39
C. The Illinois Statute Does Not Rationally Further A Legitimate State Interest	40
CONCLUSION	44

TABLE OF AUTHORITIES

Cases:	Page
<i>Beal v. Doe</i> , 432 U.S. 438 (1977)	12, 13, 43
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1976)	33
<i>Bellotti v. Baird</i> , — U.S. —, 99 S. Ct. 3035 (1979)	32
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	9
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	43
<i>Cleveland Board of Education v. LaFleur</i> , 414 U.S. 632 (1974)	32
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979)	12, 25, 34, 35, 42
<i>Connecticut v. Menillo</i> , 423 U.S. 9 (1975)	34
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	37, 38, 39
<i>Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973)	38, 40
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	12, 13, 34, 35
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	31, 33
<i>Examining Board of Engineers v. Flores de Otero</i> , 426 U.S. 572 (1976)	40, 41
<i>Glasson v. City of Louisville</i> , 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975)	41
<i>Jimenez v. Weinberger</i> , 417 U.S. 628 (1974)	39
<i>Maher v. Roe</i> , 432 U.S. 464 (1977)	passim
<i>McRae v. Califano</i> , No. 76-Civ-1804 (E.D.N.Y. Jan. 15, 1980)	21, 23, 28
<i>Memorial Hospital v. Maricopa County</i> , 415 U.S. 250 (1974)	26, 31, 32, 33, 36, 40
<i>Planned Parenthood v. Danforth</i> , 428 U.S. 52 (1976)	34, 35
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	passim
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	30, 32
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	31, 33, 41
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	33
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976)	36
<i>Weber v. Aetna Casualty & Surety Co.</i> , 406 U.S. 164 (1972)	38
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	32, 40

TABLE OF AUTHORITIES—Continued

	Page
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)....	9, 44
<i>Williams v. Zbaraz</i> , — U.S. —, 99 S. Ct. 2095 (1979)	34, 37, 39, 41, 43
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978)	32, 37
<i>Zbaraz v. Quern</i> , 469 F. Supp. 1212 (N.D. Ill. 1979)	10, 11, 24, 26, 27, 36, 37, 41
Constitution and Statutes:	
First Amendment	33
Fourteenth Amendment	
Due Process Clause	37
Equal Protection Clause	8, 9, 30, 36, 37, 39
Ill. Rev. Stat. ch. 23 §§ 5-5, 6-1, 7-1 (Supp. 1978) ..	9
Articles, Reports and Publications:	
<i>Abortion—Part 2: Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary</i> , 93d Cong., 2d Sess. (1976)	29
<i>Abortions and the Poor: Private Morality, Public Responsibility</i> (Alan Guttmacher Inst. 1979)....	35
<i>The Atlanta Constitution</i> , February 12, 1980.....	35
Cates & Tietze, <i>Standardized Mortality Rates Associated with Legal Abortion: United States 1972-1975</i> , 10 Family Planning Perspectives 109 (1978)	12, 26, 27
Center for Disease Control, <i>Health Effects of Restricting Federal Funds for Abortion—United States</i> , 28 Morbidity & Mortality Weekly Report 37 (1979)	28, 35
DHEW, <i>Adolescent Pregnancy</i> (August 4, 1977) (decision memorandum)	22
Felig, <i>Diabetes Mellitus</i> , in Medical Complications During Pregnancy 170 (Burrow & Ferris eds. 1975)	20

TABLE OF AUTHORITIES—Continued

	Page
Ferris, <i>Renal Disease</i> , in Medical Complications During Pregnancy 1 (Burrow & Ferris eds. 1975)	19
Ferris, <i>Toxemia and Hypertension</i> , in Medical Complications During Pregnancy 53 (Burrow & Ferris eds. 1975)	18
Gibbs & Locke, <i>Maternal Deaths in Texas 1969-1973</i> , 126 Am. J. of Obstet. Gynecol. 687 (1976) ..	15
Graber, Christman, Rawlings & Boehm, <i>Diabetes and Pregnancy</i> (1973)	19, 20
Horger & Facog, <i>Sickle Cell & Sickle Cell-Hemoglobin C Disease During Pregnancy</i> , 39 Obstetrics & Gynecology 873 (1972)	17
Hume, <i>Vascular Disease</i> , in Medical Complications During Pregnancy 150 (Burrow & Ferris eds. 1975)	21
Jones, <i>Hypertensive Disorders of Pregnancy</i> , 8 JOGN Nursing 92 (1979)	18
Kahler, <i>Cardiac Disease</i> , in Medical Complications During Pregnancy 105 (Burrow & Ferris eds. 1975)	14, 15, 16
Kreutner & Hollingsworth, <i>Adolescent Obstetrics & Gynecology</i> (1978)	19
Levin & Algazy, <i>Hematologic Disorders</i> , in Medical Complications During Pregnancy 689 (Burrow & Ferris eds. 1975)	17
Medical Complications During Pregnancy (Burrow & Ferris eds. 1975)	14
The Merck Manual (13th ed. 1977)	15, 16, 18
Messer, <i>Medical Indications for Pregnancy Interruption</i> , in <i>Pregnancy Termination: Procedures, Safety and New Developments</i> 305 (Zatuchni, Sciarra & Steidel eds. 1979)	15, 19
11 <i>Million Teenagers</i> (Alan Guttmacher Inst. 1976)	12, 22, 23, 24
Mitchell & Capizzi, <i>Neoplastic Disease</i> , in Medical Complications During Pregnancy 738 (Burrow & Ferris eds. 1975)	16

TABLE OF AUTHORITIES—Continued

	Page
Nadelson, <i>Abortion Counselling: Focus on Adolescent Pregnancy</i> , 54 <i>Pediatrics</i> 765 (1978)....	23
Office of Child Health Affairs, DHEW, <i>Teenage Pregnancy</i> (December, 1976)	22, 23, 24
Pernoll, <i>High-Risk Pregnancy</i> , in <i>Current Obstetric & Gynecologic Diagnosis & Treatment</i> 560 (Benson ed. 1978)	14
Petitti & Cates, <i>Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age</i> , 67 <i>Am. J. of Pub. Health</i> 860 (1977)	28
Pritchard & MacDonald, <i>Williams Obstetrics</i> (15th ed. 1976)	15, 16, 21
Speroff, <i>Toxemia of Pregnancy</i> , 32 <i>Am. J. of Cardiology</i> 582 (1973)	18, 19
Teicher, <i>A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide</i> , in <i>Current Issues in Adolescent Psychiatry</i> 124 (Brunner-Mazel ed. 1973)	23
Tietze, <i>The Effect of Legalization of Abortion on Population Growth and Public Health</i> , 7 <i>Family Planning Perspectives</i> 123 (1975)	27

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS AND EUGENE F. DIAMOND,
 Appellants
 v.
 DAVID ZBARAZ, *et al.*,
 Appellees

No. 79-5

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS
 DEPARTMENT OF PUBLIC AID,
 Appellant
 v.
 DAVID ZBARAZ, *et al.*,
 Appellees

No. 79-491

UNITED STATES OF AMERICA,
 Appellant
 v.
 DAVID ZBARAZ, *et al.*,
 Appellees

On Appeals from the United States District Court
 for the Northern District of Illinois

**BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC., ASSOCIATION
OF PLANNED PARENTHOOD PHYSICIANS, INC.,
AMERICAN PUBLIC HEALTH ASSOCIATION,
NATIONAL ABORTION FEDERATION, AMERICAN
ASSOCIATION OF SEX EDUCATORS, COUNSELORS
AND THERAPISTS, SOCIETY FOR ADOLESCENT
MEDICINE, ASSOCIATION FOR WOMEN IN
PSYCHOLOGY, NATIONAL URBAN LEAGUE, INC.,
THE AMERICAN JEWISH CONGRESS, AND CERTAIN
MEDICAL SCHOOL DEANS, PROFESSORS AND
INDIVIDUAL PHYSICIANS
IN SUPPORT OF THE APPELLEES**

Planned Parenthood Federation of America, Inc., Association of Planned Parenthood Physicians, Inc., American Public Health Association, National Abortion Federation, American Association of Sex Educators, Counselors and Therapists, Society for Adolescent Medicine, Association for Women in Psychology, National Urban League, Inc., The American Jewish Congress and 263 medical school deans, professors and individual physicians respectfully submit this brief as *amici curiae* in support of the appellees. All parties have given their consent for the filing of this brief in letters filed with the Clerk of this Court.

INTEREST OF AMICI

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc., also known as Planned Parenthood—World Population ("Planned Parenthood"), is a not-for-profit corporation organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

Planned Parenthood has 187 affiliates in forty-three states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 744 family planning clinics offering services to the public. Most affiliates offer medical services, including thirty-six which offer abortion services as part of their program. Eight affiliates are educational units without medical services. Most Planned Parenthood affiliates which do not perform abortions themselves offer pregnancy counseling and referral services.

Planned Parenthood provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering medical services functions under strict medical standards promulgated by the National Medical Committee in conjunction with local medical committees. These committees are made up of health professionals, the large majority of whom are physicians.

Planned Parenthood also functions as a clearinghouse for information and services relating to these same areas. It formulates medical and clinical standards which are available to its affiliates and to the public on a nationwide basis and develops guidelines and materials relating to public and professional education in all aspects of family planning. Its Medical Director and other consultants confer with other national medical organizations, medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers from this country and foreign countries and provide referral services for their clients to qualified medical specialists and facilities.

As a necessary corollary of its activities in the area of contraception, Planned Parenthood is committed to the principle that safe abortions should be available to all who need them. Planned Parenthood does not view abortion as an alternative to contraception; it believes, however, that abortion services are essential to protect women where contraception has been unavailable, has not been used for some other reason or has failed, particularly in cases where pregnancy poses significant health risks. It believes, moreover, that for women who need but cannot afford abortions, public funds must be made available to provide this essential service.

Association of Planned Parenthood Physicians, Inc.

Planned Parenthood works closely with the Association of Planned Parenthood Physicians, Inc. ("APPP"), a New York not-for-profit corporation organized in 1974. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. APPP was formed for scientific, educational and charitable purposes and specifically to promote the ongoing interest in family planning in order to improve the stability and health of the family through responsible parenthood. APPP has 807 members, all of whom are physicians or other health professionals associated with family planning.

American Public Health Association

The American Public Health Association is a national nongovernmental organization established in 1872. Its object is to protect and promote personal and environmental health. With a membership of over 50,000, it is the largest public health organization in the world. Within this membership, both professional health workers and consumers act in a leadership role to develop a national policy for the provision of equitable, quality health care for all citizens.

National Urban League, Inc.

The National Urban League, Inc. is a charitable organization, organized as a not-for-profit corporation under the laws of the State of New York. As the oldest non-profit, nonpartisan human rights organization in the nation, the League has waged a 70-year campaign against poverty, racism, illiteracy and neglect.

As a result of its ongoing efforts to ameliorate prevailing conditions in black ghettos, the League is painfully aware of the unacceptably poor health of many black Americans. Maternal morbidity and mortality rates among black women, and particularly among black teenagers, are significantly greater than the national averages. The League believes that the availability of abortions to all black women who are in medical need of them is critical to its efforts to reduce maternal morbidity and mortality among black women.

National Abortion Federation

The National Abortion Federation is a national, non-profit organization composed both of professional individuals and groups providing abortion services and of others committed to making safe, legal abortion available to all women.

American Association of Sex Educators, Counselors and Therapists

The American Association of Sex Educators, Counselors and Therapists is a national nonprofit membership organization founded in 1967. Its aims are to assist those professionals responsible for sex education, counseling and therapy programs by providing standards of competency in these areas.

Society for Adolescent Medicine

The Society for Adolescent Medicine is a national organization of providers of health care to the adolescent population. It consists of 800 members, all of whom are physicians and health professionals.

Association for Women in Psychology

The Association for Women in Psychology is a not-for-profit scientific and educational organization which encourages research directed toward alternatives to stereotyped sex roles. It has over 2,000 members, women and men.

The American Jewish Congress

The American Jewish Congress, a national organization of American Jews, was founded to protect the fundamental freedom of Jews and all Americans. The American Jewish Congress neither favors nor opposes abortion but believes that a woman's decision whether to undergo abortion must be her own, uncoerced by government. For that reason, it has joined in briefs *amici* submitted to this Court in *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and *Poelker v. Doe*, 432 U.S. 519 (1977).

Individual Physicians, Professors, and Medical School Deans

The 263 individual physicians who as *amici* subscribe to this brief are all involved in the provision of health care to pregnant women, either as specialists in obstetrics and gynecology, psychiatry or pediatrics, or as educators responsible for the training of medical students and residents in these fields. They are concerned that abortion services not be denied to any women who are in medical need of them, regardless of their economic status.

Amici all share a longstanding concern with the availability of quality medical care to all pregnant women. Through their various activities and efforts, they all seek a decrease in maternal morbidity and mortality. While modern medicine has an arsenal of techniques which can minimize the health risks of pregnancy, too many women, particularly poor women, still suffer severe complications and too many women still die during pregnancy.

As organizations long concerned with maternal health and as individual professionals specializing in the provision of health care to pregnant women, *amici* are in a unique position to address the special health risks which many poor women face in pregnancy and to highlight for the Court the circumstances in which physicians may conclude that abortions are medically necessary. This brief addresses these points and argues that Illinois' denial of funding for indigent women in medical need of abortions violates the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Illinois has chosen to deny funding for any abortion which a woman's physician deems to be "medically necessary" but which her physician cannot certify to be "necessary for the preservation of the life of the woman." By doing so, the state has carved out an exception to its policy of funding all medically necessary services, procedures and operations pursuant to the Medicaid statutory scheme.

The District Court correctly found that there is a class of indigent women for whom abortions are medically necessary, even though not certifiably necessary to preserve their lives, and that the state's failure to fund such abortions will substantially increase morbidity and mortality among the women in this class. The medical evi-

dence supports the conclusion that both pre-existing conditions and complications that arise during pregnancy may make an abortion medically necessary, because they may entail excessively high risks that cannot be sufficiently reduced except by the performance of an abortion. Each woman's physician must be permitted, in the exercise of his best professional judgment, to weigh the various treatment alternatives and determine whether an abortion is medically necessary for her, under all the circumstances.

By treating medically necessary abortions differently from other medically necessary services, Illinois has created a classification that violates the Equal Protection Clause of the Fourteenth Amendment. Because the classification unduly burdens the exercise of a fundamental right by withholding funding for medically necessary abortions and thereby imposing excessive health risks on indigent women who seek such abortions, and because for many indigent women the classification acts as a complete barrier to the effectuation of the fundamental right to choose to have an abortion, the classification should be subjected to strict scrutiny. Regardless of whether it is subjected to strict scrutiny or is merely tested against the rational basis standard, however, the classification is not sufficiently supported by any legitimate state interest to withstand equal protection analysis.

ARGUMENT

In *Maier v. Roe*, 432 U.S. 464 (1977), this Court held that the Equal Protection Clause of the Fourteenth Amendment is not violated by a state regulation that fails to provide Medicaid funding for a "nontherapeutic" abortion—an abortion sought by a woman on a purely elective basis rather than on the basis of her physician's opinion that an abortion is medically necessary. As the Court pointed out in *Maier*, however, the Connecticut regulation at issue there *did* provide Medicaid funding "for first trimester abortions . . . that are 'medically necessary'" *Id.* at 466.

The Illinois statute at issue here¹ is significantly different in two respects. First, the Illinois statute denies Medicaid funding for all abortions except those "necessary for the preservation of the life of the woman."² Unlike the Connecticut regulation in *Maier*, the Illinois statute thus denies funding for every abortion which a woman's physician deems to be "medically necessary" but which the physician cannot certify to be "necessary for the preservation of the life of the woman." Second, the Illinois statute is part of a statutory scheme which provides funding for all "medically necessary" services and operations other

¹ Ill. Rev. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1978). These *amici* take no position with respect to the argument raised by the United States that, insofar as the District Court held the so-called "Hyde Amendment" unconstitutional, its judgment should be vacated on the ground that there is no case or controversy with respect to that provision. See United States Brief at 26-29. If the Court rejects that argument and considers the constitutionality of the Hyde Amendment, however, these *amici* respectfully submit that the Hyde Amendment violates equal protection for essentially the same reasons set forth in the Argument herein with respect to the Illinois statute. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

² Ill. Rev. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Supp. 1978).

than abortions, regardless of whether those services are necessary for the preservation of the life of the patient.³

The issue presented in this case is thus one of first impression, *i.e.*, whether a state which funds other medically necessary services for indigent patients may withhold funding for an abortion which an indigent woman's physician has determined to be medically necessary.

The District Court ruled that Illinois may not withhold such funding. This conclusion rests on several findings of fact which, as we show in Part I below, are supported by the medical evidence in the record, as well as by recognized medical treatises. On the basis of those findings, the District Court upheld the plaintiffs' contention that "by imposing restrictions on the public funding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 [the Illinois statute] violates their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution." *Zbaraz v. Quern*, 469 F. Supp. 1212, 1216 (N.D. Ill. 1979). For the reasons set forth in Part II, *infra*, the District Court was, we submit, clearly correct in reaching this conclusion.

I. THE DISTRICT COURT CORRECTLY FOUND THAT THERE IS A CLASS OF INDIGENT WOMEN FOR WHOM ABORTIONS ARE MEDICALLY NECESSARY AND THAT THE STATE'S DENIAL OF ABORTION FUNDING FOR SUCH WOMEN WILL SUBSTANTIALLY INCREASE MORBIDITY AND MORTALITY AMONG THE WOMEN IN THIS CLASS.

The District Court's decision rests on three important and interrelated findings of fact. First, the District Court found that there exists a class of pregnant women eligible

³ By contrast, no claim was made in *Maker* that the regulation which denied funding for nontherapeutic abortions was part of a regulatory scheme which provided public funding for other nontherapeutic services.

for Illinois medical assistance programs for whom abortions are medically necessary but not certifiably necessary for the preservation of their lives. 469 F. Supp. at 1213 n.1, 1218-21. Second, the court found that this class of indigent women cannot obtain publicly funded abortions under the restrictions imposed by the Illinois statute. *Id.* at 1220-21. Third, the court found that the effect of the statute will be substantially to increase morbidity and mortality among the women in this class (*id.* at 1220); or, as the court also put it, a woman within this class "may be subjected to considerable risk of severe medical problems, which may even result in her death." *Id.* at 1219.

As we show below, each of these findings is fully supported by the medical testimony in the record and by the writings of respected medical experts, many of which were made part of the record as attachments to affidavits of medical witnesses.⁴

A. There Exists A Class Of Indigent Women For Whom Abortions Are Medically Necessary.

It is undisputed that some women experience serious medical problems during pregnancy which subject them to greater than normal risk of morbidity and mortality. Women who have pre-existing conditions such as cancer, heart disease or diabetes, for example, or who develop pregnancy-related complications such as preeclampsia, are considered high risks during pregnancy. Whether the risks to health and life in any given case are such that an abortion is medically necessary is, perforce, a medical question. As this Court recognized in *Roe v. Wade*, 410 U.S. 113, 166 (1973), "the abortion decision in all its

⁴ Testimony contained in the Appendix will be cited by the last name of the affiant, a Roman numeral if the affiant submitted two affidavits, and the page of the Appendix at which it appears; *e.g.*, Depp Aff. I ¶ —, App. p. —.

aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."

This Court has repeatedly emphasized, moreover, that the determination whether an abortion is medically necessary can be made by a woman's physician only after consideration of an array of variables and that her physician must be given the freedom necessary to evaluate these variables and to formulate his best medical judgment:

"Whether 'an abortion is necessary' is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Doe v. Bolton*, 410 U.S. 179, 192 (1973), as quoted in *Beal v. Doe*, 432 U.S. 438, 441 n.3 (1977).

See also *Colautti v. Franklin*, 439 U.S. 379, 387-88 (1979).

The degree of risk a given woman faces can only be measured against the "normal" risks of pregnancy. Pregnancy inherently involves some risk, because it results in significant physiological changes in a woman's body and places exceptional demands on her bodily functions. General morbidity and mortality rates bear this out.⁵

Obviously, however, a woman's physician must be alert for indications that she, in particular, is at greater than normal risk by reason of a pre-existing condition, such as hypertension, diabetes, heart disease, or cancer, or by rea-

⁵ See Cates & Tietze, *Standardized Mortality Rates Associated with Legal Abortion: United States 1972-1975*, 10 *Family Planning Perspectives* 109 (1978) (hereinafter cited as *Mortality Rates*); *11 Million Teenagers* (Alan Guttmacher Inst. 1976); Depp Aff. I ¶¶ 11, 13, App. pp. 32-34.

son of a pregnancy-related complication, such as pre-eclampsia. Even for a woman who does suffer from such a disease or complication, moreover, the decision whether an abortion is medically necessary will depend on a number of factors.

For example, the relative severity and associated level of risk of these medical problems obviously vary from case to case. The availability of medical facilities and resources to provide treatment also varies. Some treatment approaches may require resources which simply are not available in health care facilities to which indigent women have access. In addition, the probable effectiveness of alternative treatment approaches varies. While a range of techniques has been developed to deal with high-risk pregnancies, most of these approaches involve strict regimens, special medication, close supervision and, frequently, hospitalization. A physician must consider whether his patient can adhere to such a program. It may not be possible, for example, for a single parent with small children and no financial resources to rest in bed or to be hospitalized for an extended period of months.

Despite this Court's repeated recognition that "whether 'an abortion is necessary' is a professional judgment that . . . may be exercised in the light of all factors . . . relevant to the well-being of the patient," *Doe v. Bolton*, *supra*, 410 U.S. at 192; *Beal v. Doe*, *supra*, 432 U.S. at 441-42 n.3, the *amicus* brief filed by certain physicians in support of appellants appears to take the position that an abortion is never medically necessary because there are always alternative medical treatments that are equally effective. This position not only is at odds with this Court's previous statements as to the scope of relevant factors which a physician may weigh in deciding whether an abortion is medically necessary but, as we show below, is also refuted by the medical evidence in the record and in the recognized medical literature.

1. Both pre-existing conditions and complications that arise during pregnancy may pose excessively high risks.

There are numerous pre-existing conditions and complications of pregnancy which pose higher than normal risks to health and life and which will thus alert the physician to the possibility that an abortion may be medically necessary.⁶ The following discussion presents a few examples.⁷

Cardiac Diseases and Disorders. While modern medical techniques for the surgical and medical treatment of cardiac disease make it possible for most pregnant women with cardiac disease to survive pregnancy, such women are still at great risk. Perhaps as many as 3.7 percent of all pregnant women have diagnosed cardiac disease.⁸

⁶ The text, *Medical Complications During Pregnancy* (Burrow & Ferris eds. 1975), discusses, in addition to those outlined herein, some 20 major types of complications of pregnancy, including thyroid disease, adrenal and pituitary disorders, gastrointestinal diseases, liver diseases, bacterial and viral infections, pulmonary disease, and neurological complications. See also Pernoll, *High-Risk Pregnancy*, in *Current Obstetric & Gynecologic Diagnosis & Treatment* 560, 562 (Benson ed. 1978).

⁷ The *amicus* brief submitted by certain physicians in support of appellants discusses many of these examples. In each instance, they indicate treatments which can reduce the risks posed by the condition and conclude that an abortion is "not appropriate," "not indicated," or "not necessary." We recognize the existence of these forms of treatment and their potential for preventing death or severe health consequences in some cases. These treatments are not, however, effective in all cases or even available or feasible in all cases. As we point out in the text, moreover, the fact is that, despite the existence of sophisticated medical techniques, women still die during pregnancy because of cardiac disease, hypertension, and other conditions and complications discussed *infra*. The *amici* physicians who support appellants simply ignore this fact.

⁸ Kahler, *Cardiac Disease*, in *Medical Complications During Pregnancy* 105 (Burrow & Ferris eds. 1975).

While the mortality rate among such women has declined steadily in the past twenty-five years (in part because of the increased availability of abortions), heart disease remains a significant cause of maternal mortality, accounting for up to 10 percent of all maternal deaths.⁹ One study of maternal mortality in Texas found that heart disease caused 4.2 percent of deaths directly related to pregnancy and 17.9 percent of deaths indirectly related to pregnancy.¹⁰

Heart disease takes many forms, including rheumatic heart disease, congenital heart disease and primary pulmonary hypertension. These diseases have the common effect of reducing the patient's functional cardiac capacity. Since pregnancy increases the demands placed on a woman's cardiovascular system, carrying a pregnancy to term will result in significantly increased risk to a woman with cardiac disease.¹¹

A woman whose cardiac capacity is so impaired that she must significantly limit her physical activity is at particularly high risk during pregnancy. Such a woman may be able to carry her pregnancy to term, but only if she is hospitalized for the duration of the pregnancy under strict bed rest, strict diet and administration of digitalis.¹² If such a woman does not respond to such a regimen or cannot be hospitalized for the duration, "car-

⁹ The Merck Manual 518 (13th ed. 1977).

¹⁰ Gibbs & Locke, *Maternal Deaths in Texas 1969-1973*, 126 Am. J. of Obstet. Gynecol. 687 (1976); Messer, *Medical Indications for Pregnancy Interruption*, in *Pregnancy Termination: Procedures, Safety and New Developments* 305 (Zatuchni, Sciarra & Steidel eds. 1979) (hereinafter cited as *Medical Indications for Pregnancy Interruption*).

¹¹ Kahler, *Cardiac Disease*, *supra* note 8, at 129.

¹² Pritchard & MacDonald, *Williams Obstetrics* 612-13 (15th ed. 1976).

diac disease is an urgent indication for therapeutic abortion.”¹³

Cancer. Mitchell and Capizzi succinctly summarize the risks of cancer during pregnancy:

“[O]f all the medical illnesses complicating pregnancy, few are more ominous than cancer. Cancer threatens the life and well-being of the mother, and its required therapy may be hazardous to the fetus.”¹⁴

The existence of cancer may contribute to increased complications during pregnancy, particularly anemia.¹⁵ In addition, while pregnancy does not generally affect the course of cancer, necessary treatment for the cancer may have to be suspended because of the risks to the fetus. For example, “chemotherapy causes considerable risks of teratogenesis and carcinogenesis, if it does not cause [spontaneous] abortion, and generally should be avoided. . . .”¹⁶ An abortion may be medically necessary if therapy cannot be delayed until the pregnancy is brought to term.¹⁷

Sickle Cell Disease. Sickle cell disease involves the formation of abnormal blood cells which interfere with normal circulation.¹⁸ Whenever oxygen demand increases

¹³ *Id.*; see also Kahler, *Cardiac Disease*, *supra* note 8, at 129-30. The brief of certain amici physicians, which asserts that “abortion is not the appropriate treatment for the pregnant patient with cardiac disease,” simply does not reflect the weight of medical opinion. Brief at 8.

¹⁴ Mitchell & Capizzi, *Neoplastic Diseases*, in *Medical Complications During Pregnancy* 738 (Burrow & Ferris eds. 1975).

¹⁵ *Id.* at 740.

¹⁶ *Id.* at 770.

¹⁷ *Id.* at 743.

¹⁸ Sickle cell disorders, which almost exclusively affect blacks, are disorders in the amino acid sequences of hemoglobin molecular structures. The Merck Manual 277 (13th ed. 1977).

in the body (as it does during pregnancy), abnormal or sickle cells develop which cannot flow through capillaries. They thus block the normal flow and result in oxygen starvation, causing extremely painful crises at blockage points. These localized crises can occur anywhere in the body and can affect the functions of the kidneys, lungs, heart and other organs.¹⁹

While maternal mortality in pregnant women with sickle cell disease is relatively low in the United States, one affiant indicated that a pregnant woman with sickle cell disease has a 25 percent chance of experiencing a crisis and dying as a result of pregnancy.²⁰ In addition, “maternal morbidity is severe and the frequency of complications is high.”²¹ These complications include increased anemia, infections, pulmonary complications, hypertension and congestive heart failure. In many instances the maternal risk is considered to be too great, and therapeutic abortions are recommended.²²

Hypertensive Disorders of Pregnancy. Hypertension (high blood pressure) is one of the most common complications of pregnancy and arises in one of two forms. Some women suffer from pre-existing hypertension and experience magnified symptoms during pregnancy. Other women, who have normal blood pressures before pregnancy, develop hypertension of pregnancy, or preeclampsia, which usually appears after the 20th week of gestation and is associated with proteinuria (excessive protein

¹⁹ Levin & Algazy, *Hematologic Disorders*, in *Medical Complications During Pregnancy* 689, 703-04 (Burrow & Ferris eds. 1975).

²⁰ Zbaraz Aff. ¶ 6(e), App. p. 128.

²¹ *Id.*

²² Levin & Algazy, *Hematologic Disorders*, *supra* note 19, at 706-07; see also Horger & Facog, *Sickle Cell & Sickle Cell-Hemoglobin C Disease During Pregnancy*, 39 *Obstetrics & Gynecology* 873, 878 (1972).

in urine) and edema (excessive fluid retention).²³ Preeclampsia affects between 5 and 7 percent of all pregnant women; but it affects 30 percent of all indigent women and 24 percent of women with first pregnancies.²⁴ About 1 out of every 200 women with preeclampsia will experience convulsions, a severe form of the condition referred to as eclampsia.²⁵

The treatment of preeclampsia requires extended bed rest, sedation and salt restriction.²⁶ While some physicians may attempt to treat preeclamptic patients on an outpatient basis, it is usually necessary to hospitalize the patient for a period of weeks.²⁷

Contrary to the assertion made by certain *amici* physicians that abortion is never medically indicated for preeclampsia (Brief at 10), there are circumstances in which an abortion is recognized to be medically necessary. As one medical authority states, "pregnancy should be terminated [because of preeclampsia] either when the patient has been given the opportunity to demonstrate maximal response to therapy, or when the physician is

²³ Jones, *Hypertensive Disorders of Pregnancy*, 8 JOGN Nursing 92-93 (1979) (hereinafter cited as *Hypertensive Disorders*). Preeclampsia is frequently referred to as toxemia.

²⁴ *Id.*

²⁵ The Merck Manual 953 (13th ed. 1977). In addition to its immediate effects on a woman's health, preeclampsia may result in significant, negative health consequences to the woman in later life. Some studies indicate, for example, that preeclampsia may be correlated with the subsequent development of hypertension outside of pregnancy and that eclamptic women are more likely to become diabetic. Ferris, *Toxemia and Hypertension*, in *Medical Complications During Pregnancy* 53, 87 (Burrow & Ferris eds. 1975).

²⁶ Ferris, *Toxemia and Hypertension*, *supra* note 25, at 81; *Hypertensive Disorders*, *supra* note 23, at 94.

²⁷ Speroff, *Toxemia of Pregnancy*, 32 Am. J. of Cardiology 582, 590 (1973).

convinced that the patient will fail to respond to treatment." ²⁸

Renal Disease. Impaired renal or kidney function due to various forms of renal disease poses significant risks during pregnancy, particularly in combination with hypertension or preeclampsia. "Acute renal failure is one of the most serious complications of pregnancy" and often develops late in pregnancy in association with preeclampsia.²⁹ If renal function and hypertension worsen early in pregnancy, an abortion becomes medically necessary "since there is little likelihood of a successful pregnancy, and renal function may be permanently impaired." ³⁰

Diabetes Mellitus. Diabetes mellitus³¹ is associated with an increase in the incidence of complications in pregnancy, particularly hypertension, impaired renal function, and heart disease. When multiple complications appear, the risk to the woman's health is compounded. Diabetes is also more likely to result in complications if the woman's condition has not yet stabilized under treatment. A woman diagnosed as a diabetic within a year prior to conception is unlikely to have a stabilized condition and is thus at greater risk.³²

While maternal mortality is not significantly greater among diabetics than among nondiabetics, pregnancy may

²⁸ *Id.* at 589.

²⁹ Ferris, *Renal Disease*, in *Medical Complications During Pregnancy* 1, 34 (Burrow & Ferris eds. 1975).

³⁰ *Id.* at 32; *see also* Kreutner & Hollingsworth, *Adolescent Obstetrics & Gynecology* 192-93 (1978); *Medical Indications for Pregnancy Interruption*, *supra* note 10, at 307.

³¹ Diabetes mellitus is a metabolic disease caused by insulin deficiency resulting in increased protein and lipid utilization and decreased carbohydrate utilization.

³² Graber, Christman, Rawlings & Boehm, *Diabetes and Pregnancy* 9 (1973).

cause long-term diabetic complications, "may exaggerate the metabolic defect in diabetes," and may cause increased damage to blood vessels.³³ Many women with pre-existing retinopathy, a degeneration of the retina which can result from diabetes, have suffered a progression of retinopathy after pregnancy.³⁴ Similarly, many women with nephropathy, kidney degeneration often caused by diabetes, likewise suffer a progression of this disease as a result of pregnancy.³⁵ These risks have led one writer to conclude that "in patients with proliferative retinopathy or nephropathy . . . , interruption of pregnancy and sterilization should be the recommended course of action" ³⁶ Another authority states:

"If diabetes has been present for more than 20 years, if she has advanced diabetic vascular changes such as retinopathy and/or kidney disease, or if she is over the age of 35, the possibility of complications and an unfavorable outcome of pregnancy are increased to such a degree that the [pregnant] woman should seriously consider . . . a therapeutic abortion in the first trimester of pregnancy." ³⁷

Venous Disease. Venous thrombosis, pulmonary embolism and varicose veins are all conditions which can cause serious complications during pregnancy.³⁸ One study found that the risk of blood clotting is approximately five times greater in pregnant women than in

³³ Felig, *Diabetes Mellitus*, in *Medical Complications During Pregnancy* 170, 191 (Burrow & Ferris eds. 1975).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Graber *et al.*, *Diabetes and Pregnancy*, *supra* note 32, at 11.

³⁸ A thrombosis is a blood clot which is attached to a vessel wall; an embolism is a blood clot which has broken free and migrates through the veins.

nonpregnant control subjects.³⁹ Women who have used birth control pills are at even greater risk.⁴⁰

The risks associated with clotting continue throughout pregnancy. Generally, anticoagulant therapy is indicated and appears to reduce the mortality rate significantly, but hemorrhaging and possible risks to the fetus may require termination of such therapy,⁴¹ and an abortion may become medically necessary.⁴²

Psychiatric Factors. Many women suffer from mental illness which may be exacerbated by a full term pregnancy. A woman who suffers from mental illness and seeks to terminate her pregnancy, moreover, may suffer significant consequences if denied an abortion. One medical expert testified that if a woman suffering from mental illness is "forced to carry a pregnancy to term [she] may become severely depressed or psychotic, may suffer impairment or paralysis of functioning and may engage in . . . self-destructive behavior" ⁴³

A physician may treat a pregnant woman who suffers from mental illness by placing her in an institution under close supervision, but such treatment risks additional decline in her condition.⁴⁴ Thus, in many instances a psychiatrist may determine that an abortion is medically necessary to protect his patient from severely adverse mental health consequences.⁴⁵

³⁹ Hume, *Vascular Disease*, in *Medical Complications During Pregnancy* 150, 155 (Burrow & Ferris eds. 1975).

⁴⁰ Pritchard & MacDonald, *Williams Obstetrics* 845 (15th ed. 1976).

⁴¹ *Id.* at 161.

⁴² Zbaraz Aff. ¶ 7(d), App. pp. 127-28.

⁴³ Barglow Aff. ¶ 4, App. p. 114; *see also* *McRae v. Califano*, No. 76-Civ-1804, slip op. at 116-124 (E.D.N.Y. Jan. 15, 1980).

⁴⁴ Barglow Aff. ¶ 9, App. p. 117.

⁴⁵ *Id.* at ¶ 6, App. pp. 115-16.

2. Teenage pregnancy poses particularly serious health problems.

The physical risks of teenage pregnancy are significant. Teenagers between 15 and 19 years of age are 13 percent more likely than women in their twenties to develop fatal complications; girls under 15 are 60 percent more likely to suffer fatal complications.⁴⁶ The incidence of nonfatal complications is also greater among teenagers. The incidence of preeclampsia among teenagers, for example, is 1.3 times as great as the incidence among women in their twenties and is particularly hazardous because of the teenagers' physical immaturity.⁴⁷ Young teenagers also experience greater rates of hemorrhage and spontaneous abortion, two of the leading causes of maternal mortality.⁴⁸

Consistent and thorough prenatal care can reduce the likelihood of adverse physical consequences from teenage pregnancy. Contrary to the assertion made by certain *amici* physicians (Brief at 4), however, even the most comprehensive prenatal care does not reduce the risks to the levels experienced by older women.⁴⁹ Furthermore, comprehensive prenatal care requires the cooperation of the patient. Many teenagers have a difficult time recognizing the importance of good nutrition and

⁴⁶ 11 *Million Teenagers*, *supra* note 5, at 23.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ DHEW, *Adolescent Pregnancy* (August 4, 1977) (decision memorandum); Office of Child Health Affairs, DHEW, *Teenage Pregnancy* 9-10 (December, 1976). The latter report summarizes certain studies on this subject as follows:

"These studies are consistent in indicating, but by no means proving, that very young women as a group are biologically too immature for effective childbearing. Prenatal care, no matter how comprehensive, appears unable to ensure pregnancy outcomes similar to those sustained by older women." *Id.* at 10.

rest and are less likely than adults to be able to cooperate in a careful program of prenatal care.⁵⁰

Pregnancy also interrupts a young teenager's physical and emotional development, with potentially long-lasting or permanent consequences. This problem is particularly prevalent among young teenagers who carry their pregnancies to term within two years after the onset of menses.⁵¹ Although the emotional and psychological consequences of teenage pregnancy are more difficult to quantify than the physical risks, they are of equal or greater long-run importance.

The severity of the stress an unwanted pregnancy may produce in a teenager is apparent from suicide and illegal abortion statistics. For teenage girls, actual or suspected pregnancy is a major cause of suicide attempts.⁵² Prior to the legalization of abortion in 1970, the principal cause of death among pregnant adolescents in New York was illegal abortion.⁵³ A teenager is more likely than a mature woman to resort to illegal abortion or self-abortion because she is more likely to be desperate, to have limited access to the health care system, to lack knowledge of basic medical facts and anatomy, to misjudge or ignore risks, and to use crude and dangerous methods.⁵⁴

⁵⁰ 11 *Million Teenagers*, *supra* note 5, at 38.

⁵¹ *Teenage Pregnancy*, *supra* note 49, at 5.

⁵² Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues in Adolescent Psychiatry* 124 (Brunner-Mazel ed. 1973).

⁵³ *McRae v. Califano*, No. 76-Civ-1804, Tr. at 1347 (E.D.N.Y. 1976).

⁵⁴ *Id.* Not only does illegal abortion carry the risk of death and sterility, but it also generates greater guilt and anxiety than are experienced with legal abortion. See Nadelson, *Abortion Counseling: Focus on Adolescent Pregnancy*, 54 *Pediatrics* 765, 767 (1978).

All of the increased risks faced by pregnant teenagers generally are even further magnified for the young teenager, *i.e.*, the girl under the age of 15.⁵⁵ Fertility is increasing, not declining, in this age group.⁵⁶ The adverse effects are multiplied; moreover, when second pregnancies occur while the mothers are still under 20, as they frequently do when the first pregnancy occurs in the early teens.⁵⁷

B. The Illinois Statute Will Make Publicly Funded Abortions Unavailable To A Significant Number Of Indigent Women For Whom Abortions Are Found To Be Medically Necessary.

The District Court found that most health problems associated with pregnancy would not be covered by the Illinois statute, which provides funding only for abortions certified to be "necessary for the preservation of the life of the woman," and it further found that "those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother." 469 F. Supp. at 1220. In support of these findings, the court correctly pointed out that:

"The affidavits submitted by plaintiffs give many examples of medical conditions which would not be covered by the new Illinois standards, but which could pose a great threat to the safety of the mother." *Id.*, n.12.

The District Court accordingly concluded that "the Illinois statute as modified will deny needed medical aid to indigent mothers" *Id.* at 1220. Of course, this finding is hardly surprising in view of the medical testimony as to the nature of the medical conditions which

⁵⁵ *Teenage Pregnancy*, *supra* note 49, at 1, 4-5.

⁵⁶ *Id.* at 1; 11 *Million Teenagers*, *supra* note 5, at 12.

⁵⁷ *Teenage Pregnancy*, *supra* note 49, at 6.

may be adversely affected by pregnancy and the complications which may arise. *See* subpart A, *supra*.

That testimony demonstrates that there are relatively few cases in which a physician will be able to certify at an early stage of pregnancy that an abortion is "necessary for the preservation of the life of the woman." Rather, most cases present an array of possible outcomes, of varying degrees of probability, which might ensue from an observed condition or combination of conditions. A physician cannot measure these probabilities with any degree of precision; the various factors he must consider are inherently uncertain.

Nor will any two physicians identify and assess risks in identical fashion. Physicians vary in their emphasis on certain factors, in their experience with the diagnosis and treatment of certain diseases, and in their threshold of intervention.⁵⁸

It is clear, however, that a woman's health may be placed in serious jeopardy if her physician is forced to delay his decision until probabilities approach certainties or until unanimity among his colleagues can be achieved. Indeed, such delay may cause her health to deteriorate to a crisis condition.⁵⁹ Every week an abortion is delayed,

⁵⁸ *See* Depp Aff. II ¶ 11, App. pp. 106-07. This Court has repeatedly recognized that medical judgments are based on assessments of numerous factors that cannot be evaluated with precision and that judgments thus are likely to vary from physician to physician. *See, e.g., Colautti v. Franklin*, *supra*, 439 U.S. at 395-96.

⁵⁹ In a similar context, this Court recognized the critical importance of taking medical action before a patient's condition requires emergency treatment. In ruling on a state durational residency requirement applicable to the provision of nonemergency medical care to indigents, the Court stressed that:

"The State could not deny [an indigent] care just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is

moreover, the procedure itself involves greater risks of complications.⁶⁰

There is, of course, no way of knowing how many medically necessary abortions will be performed if the Illinois statute is upheld. The District Court pointed out that "affidavits submitted by respected members of the medical profession . . . suggest that the percentage of abortions any physician would deem 'medically necessary' may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion." 469 F. Supp. at 1221.⁶¹ Whatever the percentage, however, it is clear that the Illinois statute would deny funding for a substantial number of abortions deemed to be medically necessary by the physicians of the indigent women in question.

C. The Effect Of The Illinois Statute Will Be To Increase Morbidity And Mortality Among Indigent Pregnant Women.

Not surprisingly, no studies have been published which directly compare the mortality or morbidity rates of women having specific medical diseases who carried their pregnancies to term with the rates of other women having the same diseases who terminated their pregnancies. Studies of general death-to-case ratios are available,⁶² however, and clearly support the finding of the District

to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260-61 (1974) (footnote omitted).

⁶⁰ *Mortality Rates*, *supra* note 5, at 111.

⁶¹ One of the same affiants estimated that the percentage might be as high as 50%. See *Depp Aff. II* ¶ 11, App. pp. 106-07.

⁶² See generally *Mortality Rates*, *supra* note 5.

Court that the effect of the Illinois statute "will be to increase substantially maternal morbidity and mortality among indigent pregnant women." 469 F. Supp. at 1220.

One such study shows, for example, that if a woman carries her pregnancy to term, her risk of death is more than 24 times greater than her risk of death from an abortion performed during the first eight weeks of pregnancy.⁶³ If, after some delay, she obtains an abortion (either because she finds a private source of funding or her physician eventually determines that her case can be certified for reimbursement), her risk of death increases simply because of the delay. The mortality rate for abortions increases over thirty-fold from the eighth week to the sixteenth week of gestation.⁶⁴ If she tries to self-induce an abortion or obtains an illegal abortion, her risk of death is at least 100 times her risk of death from a legal first trimester abortion.⁶⁵ Comparable morbidity ratios would be even more extreme, moreover, for the pregnancy morbidity rate is generally four to ten percent higher than the pregnancy mortality rate.⁶⁶

These risks must, by definition, be even greater among those women for whom abortions have been found to be medically necessary but who cannot obtain them. One study included in the record estimates, for example, that the increase in mortality resulting from adoption of the Hyde Amendment (which imposes restrictions on the funding of abortions that are somewhat less severe than the Illinois statute) will be approximately seventy-seven

⁶³ *Id.* at 112.

⁶⁴ *Id.* at 111.

⁶⁵ Tietze, *The Effect of Legalization of Abortion on Population Growth and Public Health*, 7 *Family Planning Perspectives* 123 (1975).

⁶⁶ *Depp Aff. II* ¶ 11, App. p. 106.

deaths per year.⁶⁷ In *McRae v. Califano, supra*, the district court likewise found, on the basis of an extensive record, that the Hyde Amendment restrictions on funding for abortions would result in significant increased mortality. (Slip op. at 158).

Contrary to the assertion made in the *amicus* brief of the National Right To Life Committee, moreover, there is *no* evidence that the abortion funding restrictions imposed by the Hyde Amendment have not resulted in an increase in mortality or morbidity among Medicaid recipients. (National Right to Life Brief at 17). Indeed, the assertion in the Committee's brief to that effect is based on an outright misrepresentation as to the findings of a recent report by the Center for Disease Control.⁶⁸ That report deals only with the impact of the Hyde Amendment on the incidence of *abortion-related complications*, which were defined to include only "illness related to either an induced or a spontaneous abortion that caused a woman to come to an acute-care facility," and found no increase in the incidence of those complications. The report did not even consider whether increased morbidity or mortality results from *pregnancy-related complications* when women in medical need of abortions cannot obtain them because they are denied funding.⁶⁹

⁶⁷ Petitti & Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality For Women of Childbearing Age*, 67 Am. J. of Pub. Health 860, 861 (1977).

⁶⁸ *Health Effects of Restricting Federal Funds for Abortion—United States*, 28 Morbidity & Mortality Weekly Report 37 (1979).

⁶⁹ In further support of its contention that the health of indigent women denied medically necessary abortions has not been jeopardized by the Hyde Amendment, the Committee states that "one abortion is not equivalent to one birth. . . . [T]wo abortions are needed to avert one birth" and thus asserts that the risks of a full term pregnancy must be compared to the risks of two abortions. National Right to Life Brief at 17. The Committee bases this highly misleading statement on testimony of Dr. Christopher Tietze before a subcommittee of the Senate Judiciary Committee on the use of

It is clear, then, that the District Court's findings are valid and substantiated by the record and the medical literature. Many indigent women who become pregnant suffer from pre-existing conditions or develop complications during pregnancy which entail high risks. In many instances, the woman's physician, in the exercise of his best professional judgment and after weighing the various treatment alternatives, would conclude that the risks to the woman's health and life cannot be sufficiently reduced by any methods other than an abortion.

Yet Illinois refuses to fund such abortions. As a result, the class of indigent women for whom abortions are medically necessary will suffer substantially increased morbidity and mortality. As we show below, Illinois' failure to fund such medically necessary abortions constitutes a denial of the equal protection of the laws.

II. ILLINOIS' REFUSAL TO FUND MEDICALLY NECESSARY ABORTIONS VIOLATES THE EQUAL PROTECTION CLAUSE.

In *Roe v. Wade*, 410 U.S. 113 (1973), and a series of subsequent cases (discussed *infra*), this Court has struck down a variety of state statutes prohibiting or otherwise circumscribing abortion. Appellants rely primarily on only one abortion-related decision of this

abortion as a method of reducing population growth. His testimony indicates that if no other contraceptive methods were practiced, the average woman might conceive seven times during her lifetime. Dr. Tietze estimated that to reduce that average from seven to six, each woman would have to have two abortions during her lifetime. *Abortion—Part 2: Hearings before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 52 (1976). Dr. Tietze points out, however, that if every woman used contraceptives of 95 percent effectiveness, less than one abortion per woman would be required to reduce fertility by one. *Id.* Thus, the Committee's contention that the risks of carrying a pregnancy to term must be compared to the risks of having two abortions is not even remotely supported by the only authority it cites for this proposition.

Court, *Maheer v. Roe*, 432 U.S. 464 (1977), in support of their argument that the Illinois denial of funding for medically necessary abortions does not violate the Constitution. Even in that decision, however, the Court began with the premise that a state's provision of medical care to indigents must meet constitutional standards:

"The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Maheer v. Roe*, *supra*, 432 U.S. at 469-70 (footnote omitted).

Illinois has decided to alleviate some of the hardships of poverty by providing medical care. It dispenses benefits by funding essentially all medically necessary treatment except medically necessary abortions. Thus, within a class of Medicaid-eligible persons, Illinois has carved out a subclass—pregnant women in medical need of abortions—and denies that subclass the funds its members require if they are to pay for the treatment they need.

This classification violates the Equal Protection Clause of the Fourteenth Amendment. The framework of analysis under that clause was reiterated in *Maheer v. Roe*:

"We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination" *Id.* at 470, quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

We submit, first, that the Illinois statute impinges upon a fundamental right and cannot survive strict scrutiny and, second, that the statute does not even rationally further a legitimate, articulated state interest.

The District Court below, believing that *Maheer* foreclosed it from subjecting an abortion funding restriction to strict scrutiny, applied the rational basis test to Illinois' decision to single out medically necessary abortions for exclusion from its Medicaid program. Under reasoning which *amici* fully support, the court found that the statute fails to meet even that very generous standard. We also believe, however, that the facts and interests involved distinguish this case from *Maheer* (see pp. 37-38 *infra*) in such a way that strict scrutiny is appropriate. Under either line of analysis, the Illinois statute is unconstitutional, and the judgment of the District Court should be affirmed.⁷⁰

A. The Illinois Statute Should Be Subjected To Strict Scrutiny.

Whether a welfare or funding statute impinges upon a fundamental right depends on whether it affects the exercise of constitutionally protected rights and interests, not on whether a constitutional right to the welfare benefits themselves exists. For example, in *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 638 (1969), this Court struck down a waiting period requirement in a welfare statute because it touched on the fundamental right of interstate travel. Similarly, in *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972), and *Memorial Hospital v. Mari-copa County*, 415 U.S. 250, 254 (1974), the Court sub-

⁷⁰ Because the District Court thoroughly developed the rational basis analysis and did not apply the strict scrutiny test, we devote greater attention to the strict scrutiny argument. By doing so, we seek only to stress the importance of the interests that we believe justify the application of the strict scrutiny test, and not to suggest that the District Court's rational basis analysis is inadequate.

jected durational residence conditions, related to voting in one case and to medical care in the other, to strict scrutiny because they impinged upon the right to travel. By contrast, in *San Antonio Independent School District v. Rodriguez*, *supra*, 411 U.S. at 35, the Court did not strictly scrutinize a school financing scheme because the interest affected—the interest in education—was found not to be fundamental.⁷¹

In this case, Illinois' decision to withdraw funding of certain abortions impinges upon "the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy." *Bellotti v. Baird*, — U.S. —, 99 S. Ct. 3035, 3046 (1979) (Powell, J.); *see Roe v. Wade*, *supra*, 410 U.S. at 153. This right is unquestionably fundamental. *See, e.g., id.* at 152-53; *San Antonio Independent School District v. Rodriguez*, *supra*, 411 U.S. at 34 n.76; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 640 (1974); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

It is true that equal protection analysis is not ended by a determination that a statutory classification touches on a fundamental right; some inquiry into the degree of impact on the right is appropriate. *See, e.g., Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 256-

⁷¹ *Cf. Weinberger v. Salfi*, 422 U.S. 749 (1975), cited by appellant Miller for the proposition that welfare is not a fundamental right. Miller Brief at 17. Although this proposition may well be true, it is immaterial because a right to welfare is neither asserted nor at issue here. Further, the Court in *Salfi* acknowledged that there are constitutional limitations on the manner in which welfare benefits are dispensed:

"[A] noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, . . . though of course Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group,' . . . or on the basis of criteria which bear no rational relation to a legitimate legislative goal." 422 U.S. at 772 (citations omitted).

57; *Maier v. Roe*, *supra*, 432 U.S. at 472-74; *cf. Bellotti v. Baird*, 428 U.S. 132, 147, 149-50 (1976). To be impermissible, however, the interference with the exercise of the right need not be absolute. Nor must exercise of the right actually be deterred. It is sufficient if the classification penalizes or unduly burdens the exercise of the right. *See Shapiro v. Thompson*, *supra*, 394 U.S. at 631, 634; *Dunn v. Blumstein*, *supra*, 405 U.S. at 339-41; *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 257-58; *Maier v. Roe*, *supra*, 432 U.S. at 473; *cf. Sherbert v. Verner*, 374 U.S. 398 (1963).⁷² A careful examination of the rights and interests undergirding the right to choose an abortion, as delineated in *Roe v. Wade*, *supra*, and of the impact of Illinois' denial of funding for medically necessary abortions demonstrates that the

⁷² In *Sherbert v. Verner*, the Court ruled that a denial of unemployment compensation benefits due to the claimant's refusal to work on Saturday burdened the claimant's free exercise of her religion. Even though the case focused on a First Amendment right, the Court's analysis in that case is like the penalty analysis in equal protection cases and applies with equal force here:

"We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But that is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' *Braunfeld v. Brown*, [366 U.S. 599] at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. . . . Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 403-04 (footnote omitted).

denial of funding unduly burdens the exercise of the right to choose an abortion.

Roe v. Wade, its companion decision *Doe v. Bolton*, 410 U.S. 179 (1973), and their progeny, in analyzing the woman's fundamental privacy right encompassing the abortion decision, have stressed several interests related to that right and the abortion decision. Among these are the following: the woman's interest in her health; the woman's corollary interest in obtaining her physician's best medical judgment, untainted by nonmedical considerations such as her ability to pay; and the state's interest in the woman's health. *E.g.*, *Roe v. Wade*, *supra*, 410 U.S. at 153, 162-64.⁷³

The interest in the woman's health has been emphasized in several recent decisions. In *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam), the Court upheld the state's efforts to prohibit the performance of abortions by nonphysicians because such a prohibition promoted the health of the women affected. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 75-79 (1976), and *Colautti v. Franklin*, 439 U.S. 379, 398-400 (1979), the Court struck down state regulations adverse to the health interests of the women affected.⁷⁴ See also *Williams v. Zbaraz*, 99 S. Ct. 2095, 2098-99 (1979) (Stevens, J.) (denial of stay). The interest of a woman in securing the sound medical judgment of her physician has likewise been a

⁷³ Of course, *Roe v. Wade* also recognized a state interest in potential life. That interest, addressed at pp. 42-43 *infra*, is not discussed here because it is not infringed by the Illinois statute and because this Court has emphasized that it cannot override the interest in the woman's life and health. See *Roe v. Wade*, *supra*, 410 U.S. at 164-65; *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).

⁷⁴ In *Planned Parenthood*, the Court invalidated a prohibition on the use of a method of abortion that was safer for the woman than various alternative methods. In *Colautti*, the Court held that a statute appearing to give fetal existence priority over the health of the woman was unconstitutional.

focus in a number of recent decisions. See, *e.g.*, *Doe v. Bolton*, *supra*, 410 U.S. at 191-92; *Planned Parenthood v. Danforth*, *supra*, 428 U.S. at 63-64; *Colautti v. Franklin*, *supra*, 439 U.S. at 387-88, 393-94.⁷⁵

Illinois does not and cannot argue that, like the state action in *Menillo*, its denial of Medicaid funding for medically necessary abortions promotes the health of women. Instead, like the statutes in *Planned Parenthood* and *Colautti*, the Illinois statute can serve only to interfere substantially with the woman's interest in her health and to thwart rather than advance the state's interest in her health.

By definition, Medicaid-eligible women do not have sufficient income and resources to meet the costs of necessary medical services. The denial of funding leaves these women with few courses of action other than forgoing needed abortions or procuring the additional funds necessary to finance legal abortions.⁷⁶ Because an abortion is medically necessary only when it is likely that pregnancy or childbirth will entail excessive risks, forgoing such an abortion necessarily exposes a woman to a significant possibility of health damage or death. Even if

⁷⁵ See Part I, *supra*, for discussion of the factors that only a physician can evaluate.

⁷⁶ Other possible courses of action include obtaining free abortions, attempting self-abortion, and procuring cheap illegal or "back alley" abortions. However, few free abortions are available, and the medical system cannot reasonably be expected to absorb the cost of abortions for all Medicaid-eligible women who need them. *Abortions and the Poor: Private Morality, Public Responsibility* 28 (Alan Guttmacher Inst. 1979). Conclusive evidence on the extent to which the lack of funding is forcing or will force resort to self-abortion and back alley abortions is difficult to gather. Early evidence appeared to indicate that few such abortions were occurring, but more recent data suggest an increase in such abortions. See Center for Disease Control, *Health Effects of Restricting Federal Funds for Abortion—United States*, 28 Morbidity & Mortality Weekly Report 37 (1979) and unpublished data available from the CDC, cited in *The Atlanta Constitution*, Feb. 12, 1980, at 3-A, col. 2.

a woman ultimately is able to secure the funds to pay for an abortion,⁷⁷ the delay that occurs while she collects the funds itself involves health risks and also magnifies the risks inherent in the abortion procedure.⁷⁸

The woman's interest in her physician's medical judgment is similarly infringed by the Illinois statute. The absence of funding through the channels normally used by the indigent patient and her physician for medically necessary treatment injects a nonmedical factor—money—into the physician's evaluation of the woman's needs. Indeed, the lack of funding may effectively remove from the physician's consideration the one form of treatment that may be the most appropriate means of preserving his patient's health.

Memorial Hospital v. Maricopa County, *supra*, establishes that when the exercise of a constitutional right is burdened by the withholding of funding for medical care that is necessary for the preservation of health, such a deprivation impinges upon the exercise sufficiently to invoke strict scrutiny under the Equal Protection Clause. The Court there held that a temporary denial to indigents of nonemergency health care penalized the exercise of the right to travel because it subjected those affected to "the danger of a substantial and irrevocable deterioration of . . . health," though not to an immediate risk of death. 415 U.S. at 259-61. Further, as Justice Blackmun noted in *Singleton v. Wulff*, 428 U.S. 106, 118-19 n.7 (1976): "For a doctor who cannot afford to work

⁷⁷ The woman may resort to obtaining the necessary funds for the abortion out of general public assistance, her only other ready source of money, and thereby deprive herself or her family of other basic necessities.

⁷⁸ As was fully discussed in Part I above, for all of these reasons the District Court properly found that the denial of funding for medically necessary abortions will substantially increase maternal mortality and morbidity among those affected. *Zbaraz v. Quern*, 469 F. Supp. 1212, 1220 (N.D. Ill. 1979).

for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary."⁷⁹

In short, when measured against prior decisions of this Court, Illinois' denial of funding for medically necessary abortions clearly penalizes and nearly interdicts the exercise of a fundamental right, and, accordingly, should be subjected to strict scrutiny under the Equal Protection Clause.⁸⁰ To avoid such scrutiny, the appellants rely heavily on *Dandridge v. Williams*, 397 U.S. 471 (1970), and on *Maher v. Roe*, *supra*. See, e.g., Miller Brief at 76, 79; Williams Brief at 37, 43, 64-65, 67-69; United States Brief at 51-53. In *Maher* the Court did hold that a statute precluding Medicaid funding of certain abortions did not have to withstand strict scrutiny. *Maher v. Roe*, *supra*, 432 U.S. at 474, 477. There is a critical distinction between this case and *Maher*, however, which renders *Maher's* holding inapplicable here.

Maher addressed demands for funding of nontherapeutic abortions. *Id.* at 466-67. Therefore, the health interests that are central to this case and that are in-

⁷⁹ See also *Williams v. Zbaraz*, *supra*, 99 S. Ct. at 2098, 2099 (recognizing that, without funding, many if not most indigent women for whom abortions are medically necessary will not be able to have them, and their constitutional right to choose abortion will be meaningless).

⁸⁰ As the District Court below indicated, the equal protection analysis subsumes due process analysis. *Zbaraz v. Quern*, *supra*, 469 F. Supp. at 1216 n.5. Because the funding denial unduly burdens and nearly interdicts the exercise of a fundamental right, it could appropriately be analyzed under the Due Process Clause of the Fourteenth Amendment. See *Maher v. Roe*, *supra*, 432 U.S. at 484-89 (Brennan, Marshall, and Blackmun, JJ., dissenting); cf. *Zablocki v. Redhail*, *supra*, 434 U.S. at 391-96 (Stewart, J., concurring). The funding denial clearly disturbs the balance of interests struck in *Roe v. Wade*, by establishing the state's preference for fetal existence over the health of the woman, even during the first two trimesters of pregnancy.

terests of the state as well as of the woman⁸¹ simply were not implicated in *Maher*. Moreover, in seeking funding for nontherapeutic abortions, the plaintiffs in *Maher* were, in effect, seeking more favorable treatment than other Medicaid-eligible persons received, for the Medicaid program generally covers only medically necessary services, not nontherapeutic ones. See *id.* Thus, unlike the present case, *Maher* did not involve discrimination among medically necessary treatments, and the denial of funding there did not expose the pregnant plaintiffs to substantial deleterious effects on their health.⁸²

Dandridge v. Williams, *supra*, likewise is inapposite, for two reasons. First, as the Court in *Dandridge* itself noted, the regulation in *Dandridge*, which allocated welfare funds among eligible families, did not affect freedoms guaranteed by the Bill of Rights. *Dandridge v. Williams*, *supra*, 397 U.S. at 484; see *Department of Agriculture v. Moreno*, 413 U.S. 528, 544 (1973) (Douglas, J., concurring). As the Court reasoned in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972): "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental per-

⁸¹ *Roe v. Wade*, *supra*, 410 U.S. at 154, 159, 162-63.

⁸² This distinction also undercuts appellants' reliance on an observation appearing in a footnote in the *Maher* opinion: "*Shapiro and Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers." *Maher v. Roe*, *supra*, 432 U.S. at 474-75 n.8. Appellants seize upon this statement as support for their argument that Illinois does not penalize the exercise of the right to seek an abortion by refusing to pay for it. See Miller Brief at 76; *Williams* Brief at 40, 68. The Court's observation in *Maher*, however, suggests only that states have no affirmative obligation, in the absence of other factors, to pay for the means to effectuate certain rights; it does not mean that states that generally provide payment for medically necessary services can choose to exclude payment for one such service, when that exclusion interferes with the effectuation of a fundamental right.

sonal rights, this Court exercises a stricter scrutiny." Unlike the classification in *Dandridge*, the Illinois classification in denying funding for medically necessary abortions imposes a substantial impediment to the exercise of such sensitive and fundamental personal rights.

Second, the premise of *Dandridge* was that, because the state's welfare funds were finite, an increase in the benefits for those who claimed that they were treated unfairly would have necessitated a decrease in the benefits of others. *Dandridge v. Williams*, *supra*, 397 U.S. at 479; see *Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974). That is not the situation in the case now before the Court. Because abortions are significantly less expensive than the medical care associated with full-term pregnancies and childbirth,⁸³ the allocation of public funds for abortions will increase the amount of funds available for other purposes.⁸⁴ *Dandridge* thus is inapplicable on this ground as well.

In sum, the discrimination imposed by the Illinois statute between indigent women in medical need of abortions and indigent persons in need of other medical services impinges upon the fundamental right to seek an abortion and should be subjected to strict scrutiny.

B. The Illinois Statute Does Not Further A Compelling State Interest.

A statute subjected to strict scrutiny under the Equal Protection Clause must further a compelling state inter-

⁸³ Indeed, as Justice Stevens noted in denying a stay of the District Court's order in this case: "[I]t is less expensive for the State to pay the *entire cost* of abortion than it is for it to pay only its *share of the costs* associated with a full-term pregnancy." *Williams v. Zbaraz*, *supra*, 99 S. Ct. at 2098 (emphasis added).

⁸⁴ Cf. *Jimenez v. Weinberger*, *supra*, 417 U.S. at 633 (*Dandridge* distinguished; in *Jimenez*, there was no showing that correction of the invalid classification would significantly impair the fund or necessitate a reduction in the scope of persons benefited).

est if it is to stand. *E.g.*, *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 254, 262. As the District Court below correctly concluded, and as is more fully discussed in Part II.C. below, the Illinois denial of funding for medically necessary abortions does not even rationally further a legitimate state interest. The denial *a fortiori* does not further a compelling state interest.

C. The Illinois Statute Does Not Rationally Further A Legitimate State Interest.

Even if a statutory classification neither impinges upon a fundamental right nor discriminates against a suspect class, it still must be rationally related to a legitimate governmental purpose. *Maher v. Roe*, *supra*, 432 U.S. at 478. As the District Court's analysis makes clear, however, the state interests asserted below do not support the Illinois funding discrimination between medically necessary abortions and other medically necessary services.⁸⁵ Moreover, the record shows that whatever

⁸⁵ On this appeal, appellants raise several justifications not offered below. These justifications, untimely raised, either are not legitimate state interests or are not furthered by the statute. For example, appellants postulate an interest in avoiding spending public funds, raised by taxes, to support an activity that many taxpayers find morally repugnant. *E.g.*, Miller Brief at 80; Williams Brief at 57, 61-62; United States Brief at 55. This interest is not legitimate for purposes of equal protection analysis. As the Court stated in *Department of Agriculture v. Moreno*, *supra*, 413 U.S. at 534: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." [Emphasis the Court's.] See also *Weinberger v. Salfi*, *supra*, 422 U.S. at 772 (quoting *Moreno*); *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 266 (state may not maintain political acceptability of programs by excluding an unpopular class from benefits); *cf.* *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1976) ("[asserted] justification amounts to little more than an assertion that discrimination may be justified by a desire to discriminate"). Taxpayer wishes cannot justify the infringement of others' rights;

permissible interests are now asserted to justify singling out medically necessary abortions for exclusion from the Medicaid program were far from the minds of the Illinois legislators who enacted the statute; the real purposes of the statute are impermissible ones.

The District Court properly disposed of the assertion of a state interest in limiting public welfare expenditures and allocating scarce funds. The record clearly establishes that an abortion costs significantly less than a normal full-term pregnancy and delivery. Therefore, it obviously costs less than an *abnormal* pregnancy and birth requiring more than normal medical care. *Zbaraz v. Quern*, *supra*, 469 F. Supp. at 1218; see *Williams v. Zbaraz*, *supra*, 99 S. Ct. at 2098. Additionally, as a result of the Illinois statute, the state may incur costs of placing children their mothers cannot care for, costs of care for abnormal children, and increased welfare costs for children the mothers cannot support. Any assertion of a fiscal interest in the limitation of abortion funding is frivolous.

The appellants have emphasized a second interest, that in encouraging childbirth, because this Court in *Maher* recognized that the encouragement of *normal* childbirth is a legitimate state interest. Miller Brief at 78-80;

the Bill of Rights and the Fourteenth Amendment were designed in part precisely to shield certain rights and liberties of minorities from encroachment by the majority or a more powerful minority. *Cf.* *Glasson v. City of Louisville*, 518 F.2d 899, 905-06 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

The intervening appellants also suggest an interest in preventing fraud. Williams Brief at 76-83. This Court provided a sufficient answer to this argument in *Roe v. Wade*, *supra*, 410 U.S. at 166: "If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." Guarding against fraud by blocking access to abortions by indigents who need them is irrational. *Cf.* *Shapiro v. Thompson*, *supra*, 394 U.S. at 636; *Examining Board of Engineers v. Flores de Otero*, *supra*, 426 U.S. at 606.

Williams Brief at 48, 56; United States Brief at 57-64; see *Maier v. Roe*, *supra*, 432 U.S. at 477. The District Court also correctly found that this interest, the boundaries of which are defined by *Roe v. Wade* and *Maier v. Roe*, does not support the Illinois statute.

Roe v. Wade emphasized that the state has two interests related to pregnancy which may justify regulations affecting abortion. One is in the health of the woman and the other is in the potential life of the fetus. Both of the state's interests exist throughout a pregnancy though they do not become compelling until certain points during the pregnancy. *Roe v. Wade*, *supra*, 410 U.S. at 162-63.⁸⁶ *Maier* recognized that the state could take certain actions to implement its interest in potential life, even during the first two trimesters, where the health of the woman, or the state's interest in that health, was not at risk. *Maier* did not, however, accelerate the time at which the state's interest in potential life becomes compelling or authorize a state to give fetal life priority over the life or health of the woman. See *Colautti v. Franklin*, *supra*, 439 U.S. at 400.

On the contrary, *Roe v. Wade*, *supra*, 410 U.S. at 163-64, made it clear that the state may not proscribe an abortion even after viability "when it [the abortion] is necessary to preserve the life or health of the mother." (Emphasis added.) As Justice Stevens pointed out in denying appellants' applications for a stay in this case:

"*Roe v. Wade*, 410 U.S. 113, . . . itself establishes that the State's interest in potential life is never so great that it can outweigh the woman's interest in her health Moreover, the State clearly has an interest in preserving and protecting the life and health of the mother, as well as in promoting child-

⁸⁶ The state's interest in the woman's health becomes compelling first, approximately at the end of the first trimester. The interest in potential life becomes compelling at the point of viability. *Id.*

birth. In this case, where we deal only with 'medically necessary' abortions, the weight to be accorded to the State's interest in childbirth must necessarily be diminished by its acknowledged interest in the health of the mother." *Williams v. Zbaraz*, *supra*, 99 S. Ct. at 2098.

Furthermore, it must be remembered that the state interest in promoting childbirth which this Court acknowledged in *Maier* was repeatedly described as an interest in promoting *normal* childbirth. *Maier v. Roe*, *supra*, 432 U.S. at 477, 479; see also *Beal v. Doe*, 432 U.S. 438, 446 (1977). Yet the Illinois statute does not further this legitimate interest at all.

Childbirth cannot be "normal childbirth," we submit, when it results from the inability to obtain a medically necessary abortion. It does not "encourage normal childbirth" to deny a poor woman the funds to terminate a pregnancy where that pregnancy may cause or exacerbate a condition threatening her health or life. It does not "encourage normal childbirth" to deny a poor woman funds to terminate a pregnancy likely to end, at a later date, in surgical intervention that could pose a threat to her life. It does not "encourage normal childbirth" to force a woman with serious psychological problems to undergo the extreme stress of an unwanted pregnancy, which might foreclose the possibility that she will conquer her illness.⁸⁷

⁸⁷ Moreover, even if the Illinois statute could be deemed to further this or another permissible state interest asserted by the parties, it does not *rationally* further such an interest. It is not rational for a state to achieve even a legitimate state purpose by deliberately inflicting harm on certain citizens. See *Carey v. Population Services International*, 431 U.S. 678, 715-16 (1977) (Stevens, J., concurring). This is especially true in this case, where the state has an affirmative interest, recognized by this Court in *Roe v. Wade*, in the maternal health that is harmed by the statute.

In short, none of the asserted state interests justifies the Illinois statute. Furthermore, a reading of the legislative history (Appendix at 42-88) brings into stark relief the true purposes of the statute: to implement a belief that life begins at conception, and to discourage or prevent all abortions that the legislators thought they could reach—namely, those sought by poor women dependent on public funds for medical care.⁸⁸ The statute can be understood by those women only to mean that the state wants to prevent them from obtaining abortions, even at the expense of their health. Under *Roe v. Wade*, such a legislative purpose cannot be upheld.

CONCLUSION

For all the foregoing reasons, the District Court's judgment that the Illinois statute is unconstitutional should be affirmed.

Respectfully submitted,

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February 1980

⁸⁸ "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (citations omitted).

U.S. Court, D.C.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS, et al., Appellants

vs.

DAVID ZBARAZ, et al., Appellees

No. 79-5

ARTHUR F. QUERN, etc., et al., Appellants

vs.

DAVID ZBARAZ, et al., Appellees

No. 79-491

UNITED STATES OF AMERICA, Appellant

vs.

DAVID ZBARAZ, et al., Appellees

On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

MOTION TO APPOINT COUNSEL FOR
CHILDREN UNBORN AND BORN ALIVE

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MOTION FOR APPOINTMENT OF ALAN ERNEST AS
COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penalty.

The evidence shows that the hysterotomy is a common method of performing abortions under *Roe v Wade*. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins ch.13, s. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. *Rex v Senior*, 1 Moody CC 346(1832); *Reg. v Trilloe*, 174 Eng. Rep. 674(1842); *Reg. v West*, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of *Regina v West*, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of *Regina v West*, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. *Clarke v State*, 117 Ala 1(1898); *Hamilton v United States*, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., *Clarke v State*, 117 Ala. 1(1898); *State v Winthrop*, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited *Regina v West*, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, *A Treatise on the Law Homicide in the United States* 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, *Roe v Wade* permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. *Ross v Oregon*, 227 US 150(1913). Consequently, if *Roe v Wade* is a mistake of law, then mass murder is being perpetrated in America. The *Roe v Wade* hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, *Comm. v Harmon*, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, *Clarke v State*, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, *People v Chavez*, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 *The Collected Works of Abraham Lincoln* 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 *Wharton's Criminal Law and Procedure*, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., *Commonwealth v. Edelin*, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397 (GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost all were born alive." *Id.*, at 397.

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but...the lawmaker has determined to make men know and obey." Holmes, *The Common Law* 41 (Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

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IN THE
Supreme Court of the United States
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UNITED STATES OF AMERICA, Appellant

vs.

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On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF
AS AMICUS CURIAE BY THE LEGAL DEFENSE FUND
FOR UNBORN CHILDREN IN SUPPORT OF
THE APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN
CHILDREN

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

INDEX

Brief by amicus curiae	1
Summary of Argument	1
Argument	2
PART I: Roe v Wade is Based on False Evidence	2
PART II: The Court's Procedures are Unconstitutional	7
PART III: The Case Against the Supreme Court	11
PART IV: The Supreme Court has Overthrown the United States Constitution	15
Conclusion	23

AUTHORITIES

Cases

Baxter v Palmigiano, 47 L Ed 2d 810	14
Dartmouth College v Woodward, 4 Wheat. 518 . . .	17
Marbury v Madison, 1 Cranch 137	13,22
Ogden v Sanders, 12 Wheat. 212	17
State v Moore, 25 Iowa 128	6
The Justice Case, 3 Trials of War Criminals before the Nuernberg Milirary Tribunals . . .	19

Texts

Archbold, J.F., Archbold's Criminal Procedure, Pleading and Evidence(6th ed 1853)	6
Berger, R., Government by Judiciary: The Trans- formation of the Fourteenth Amendment(1977). .	20
Denman, T., M.D., An Introduction to the Practice of Midwifery (1802)	4
Hodge, H.L., M.D., The Principles and Practice of Obstetrics (1864)	4
Transactions of the American Medical Assn. . . .	6

AMICUS CURIAE BRIEF

For the 51st time, the Supreme Court is petitioned to overrule its 1973 abortion decision, Roe v Wade, 410 US 113. The grounds are set out below in the SUMMARY OF ARGUMENT.

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, *infra* pages 2-7.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, *infra* pages 8-11.

3. It is further alleged that many of the killings that the U.S. Supreme Court asserted to legalize in Roe v Wade are murder in the first degree. The evidence presented in the MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE, filed in this case, is incorporated herein by reference.

4. It is further alleged that the Roe v Wade killings violate federal and state positive criminal statutes. The U.S. Supreme Court is herein charged with crim-

inal falsehood and criminal extermination, including mass murder in the first degree. See PART III, infra pages 11-14.

5. It is alleged that the judges of the United States have combined to overthrow the Constitution of the United States and to establish a government by Judiciary, founded on fraud and murder. See PART IV, infra pages 15-22.

ARGUMENT

PART I

ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113, is based on false evidence and millions of lives have been unconstitutionally exterminated. The documentation to prove this charge has been repeatedly submitted to the Supreme Court.

This documentation was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v. John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the

same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." *Roe v Wade*, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, *A Hundred Years of Medicine* 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., *An Introduction to the Practice of Midwifery* 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., *A Complete Treatise on Midwifery* 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., *The Principles and Practice of Obstetrics* 293(1864)(American phy-

sician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." *Roe v Wade*, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Roe v Wade*, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v Wade*, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment, "any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and

more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II

THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings are in such manifest conflict with due process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No. 78-427, cert. denied 58 L Ed 2d 324):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg

court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [The Justice Case *infra* p. 19, at 1046.]

"The U.S. Supreme Court has, in broad form, used these very procedures to effect the *Roe v Wade* killings. For example, in *Roe v Wade*, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, *Doe v Bolton*, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, *Doe v Bolton*, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented.¹

1. In *Planned Parenthood of Central*

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to

Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after *Roe v Wade*) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, *supra*, and alleging that "newly discovered evidence indicates that *Roe v Wade* rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, *Supreme Court Practice* 728 (5th ed 1978). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. *Mapp v Ohio*, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing *Roe v Wade* to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing *Roe v Wade* to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of *Roe v Wade*.

And the Supreme Court either refused permission to file amicus curiae briefs, or refused to fully and fairly hear amicus curiae briefs, which presented this new evidence, in *Colautti v Franklin*, 58 L Ed 2d 596; *Bellotti v Baird*, L Ed 2d ; *Anders v. Floyd*, 59 L Ed 2d 442; and *Ashcroft v Freiman*, affd 59 L Ed 2d 630.

2. The Supreme Court has repeatedly refused to allow counsel to represent children unborn or born alive in its judicial proceedings, and to defend their constitutionally protected right to life.

In *Doe v Bolton*, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing at 5. But the Court denied the request.

In *Colautti v Franklin*, 58 L Ed 596, the Court again extended the killings in the name of *Roe v Wade*, after refusing to allow counsel to represent the victims and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. Motion denied at 57 L Ed 2d 1131.

In *Anders v Floyd*, 59 L Ed 2d 442, the Court again refused to allow counsel to represent the victims, and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 59 L Ed 2d 442.

In *Bellotti v Baird*, L Ed 2d , the Court refused to allow counsel to represent the victims and present new evidence (See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE in this case) to show that the victims were being murdered. 59 L Ed 2d 451.

In *Ashcroft v Freiman*, 59 L Ed 2d 630, the Court affirmed an appeal after refusing to allow counsel to represent the victims and defend their constitutional right not to be murdered.

And the Supreme Court refused to allow counsel to represent the victims and defend their constitutional right not to be murdered in *Baird v Sharp*, cert. denied 60 L Ed 2d 1057, and *Preterm v King*, cert. denied 60 L Ed 2d 1057.

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

Thus, the Court has repeatedly heard and decided abortion cases, and struck down state abortion laws, and effectively extended the killing in the name of *Roe v Wade*, and refused to appoint counsel to represent the victims and present new evidence, never presented by the parties, to show that the victims are being exterminated in violation of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree.

It can not be pretended that it is any longer the government of the United States--any government of Constitution and laws--wherein judges presume to decree killing to be a constitutional right and refuse to even listen to the facts.

PART III THE CASE AGAINST THE SUPREME COURT

Counsel's 8th (Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77-1358), and each subsequent petition, specified the criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And counsel's 25th petition, and each subsequent petition, to overrule Roe v Wade presented the new evidence, adopted herein by reference, which shows many Roe v Wade killings to be murder in the first degree. The Justices who asserted to legalize those killings may now face the death penalty in very many states.

The Supreme Court has never attempted to show the new evidence to be wrong, much less to prove the charges to be false.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353 (1972). "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact..... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810, 822 (1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" And again, "I may assume that your silence gives consent." Apology in Plato 41, 45 (Jowett transl. Classics Club 1942). See also, 4 Wigmore, Evidence, §§ 1071-1072 (Chadbourn rev. 1972).

PART IV

THE SUPREME COURT HAS OVERTHROWN THE UNITED STATES CONSTITUTION

The evidence shows that the judges of the United States have combined to overthrow the United States Constitution, and to establish a government by Judiciary, founded on fraud and murder.

A.

It can not be contested that America was founded upon the principle that government derives its "just powers from the consent of the governed." This was adopted by the Continental Congress in the Declaration of Independence. While the Declaration may not be law in itself, it provides definitions by which the law is to be understood. Gulf, Colo. and S.Fe Ry v Ellis, 165 US 150, 159-160 (1896).

The first sentence of the U.S. Constitution sets out this mother principle of democracies: "All legislative powers herein granted shall be vested in a Congress of the United States." Congress is elected by the people at regular elections, and thus, its laws are derived from the consent of the governed.

The Constitution itself was adopted by the people in convention. The Constitution is thus derived from the consent of the gov-

erned. And Article V of the Constitution provides the means for amending the Constitution, which likewise makes amendments be derived from the consent of the governed.

B.

Under the U.S. Constitution's Article III, the federal judiciary is not elected by the people, and holds office during good behavior, in effect, for life.

The Constitution gives the judges no power to make laws. The lawmaking power, as admitted by the Supreme Court, is the power to make new rules for the future. *Ross v Oregon*, 227 US 150, 161 (1913).

While the judicial power does not admit to lawmaking, it has been decided that it does admit to determining the meaning of statutes, and the U.S. Constitution. *Marbury v Madison*, 1 Cranch 137(1803). But the Supreme Court has no power to make new laws under the guise of construction. *Pillsbury v United Engineering*, 342 US 197, 199.

The rules used by the courts to construe the meaning of the laws are founded in the principle that laws are derived from the consent of the governed. The purpose of construction is to determine the intent of the lawmaker.

Chief Justice John Marshall recognized this "consent of the governed" as the foundation of the rules that the courts must apply in construing the Constitution.

FIRST: The Constitution must be given the meaning "contemplated by its framers."

Ogden v Sanders, 12 Wheat. 212, 332(1827) (dissenting opinion).

SECOND: "(I)n no doubtful case would it pronounce a legislative act to be contrary to constitution." *Dartmouth College v Woodward*, 4 Wheat. 518, 625(1819).

The foundation under these two rules is too compelling to admit any doubt as to the truth of the two rules.

Since the legitimacy of the Constitution is derived from the consent of the governed, any true construction must give the Constitution the meaning intended by the people who framed and adopted it. The central question is: To what have the people consented. Any policy of construction that disregards the consent of the governed can not be lawful. And to what the people have consented is susceptible to proof by evidence which can be independently verified. Thus the security of a written Constitution.

The second rule is a necessary corollary of the first. The right of the people to govern themselves being so paramount, it takes careful and clear evidence to warrant a conclusion that, in the U.S. Constitution, the people intended to withdraw from themselves the power to make their own laws on that subject. If, after review of the words of the Constitution, and the historical evidence concerning the meaning of those words, a reasonable doubt remains as to whether the makers of the Constitution intended to prohibit such a law, then

the law must stand as valid. The opinions of unelected officials holding office for life are not to be substituted for the judgments of the peoples' elected representatives unless the conflict between the law and the Constitution is clear.

The decisions of Chief Justice John Marshall are submitted as a faithful execution of these two principles of construction.

C.

In his Farewell Address, Washington warned that the customary means of overthrowing constitutions was by usurpation:

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. 35 The Writings of George Washington 229(Fitzpatrick ed. 1949).

D.

The world does not want for examples of democratic constitutions overthrown by the process of usurpation.

Prior to World War II, the German Constitution was thought to be a model of democracy and freedom, "the most liberal and democratic document of its kind the twentieth century had seen," which declared "Political power emanates from the people." W.L. Shirer, *The Rise and Fall of the Third Reich*

88-89(Fawcett Crest paperback 1969). Hitler came to power "within the terms of the constitution." *Id.*, at 255.

Thereafter, by usurpation, Hitler became the "supreme judge" of Germany. The Justice Case, 3 Trials of War Criminals before the Nuernberg Military Tribunals 1011 (1951). The decrees of this "supreme judge" were obeyed as law. The "supreme judge" presumed to decree murder to be lawful. And this "supreme judge" was unquestioningly obeyed by the Nazi judges.

At Nuremberg, the Nazi judges claimed the defense that they could not be held accountable for their crimes against humanity, including "extermination," because they were bound by the "decrees" of the "supreme judge" of Germany. The Justice Case, *supra*, 983-85, 1010-1014. The Nuremberg court rejected that defense with the observation, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, *supra*, at 985.

Never formally repealed, the Constitution was overthrown by usurpation.

E.

The evidence shows that the judiciary of the United States has set upon a course of usurpation astonishingly similar to that traveled by the Nazi judicial system.

The judges of the United States came to power within the terms of the Constitution. The evidence shows that the judges routinely, as a matter of policy, defy the consent

of the governed, and effectively assert their will to be law. See, R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment(1977). This book sets out evidence to show that the Supreme Court has generally construed the Fourteenth Amendment in defiance of the intent of its framers. Berger concludes, "Such conduct impels one to conclude that the Justices are become a law unto themselves." Id., at 408.

The evidence shows that the Supreme Court uses false evidence to defy the intent of the framers. Supra, PART I.

The evidence shows that the Supreme Court has presumed to decree murder to be a constitutional right.. See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE incorporated herein by reference.

The evidence shows that when it comes to constitutional questions, truth has nothing to do with the federal courts: the will of the judge has become the law.

The evidence, supra pages 7-11, shows that the Supreme Court , in broad form, has used the same procedures to effect and maintain the Roe v Wade killings as the Nazi judges used to condemn their victims:

In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. The Justice Case, supra, 1046.

The evidence shows that, through Roe v

Wade, the Supreme Court has effectively asserted a second method for the government to condemn persons to death.

The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right of representation of counsel; and right to confront the accusing evidence and cross-examine it; and right to present evidence on behalf of the accused; and right to be acquitted unless found guilty beyond a reasonable doubt; and provision to stop execution if new evidence is discovered.

The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims) to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution.

The evidence, supra, shows that the Supreme Court decreed murder to be a constitutional right, and there does not appear to be any defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany so the Supreme Court is to America.

The evidence shows that the Supreme Court is being unquestioningly obeyed by the federal judiciary. See counsel's 34th & 35th petitions to overrule Roe v Wade, Unborn Child Roe v. United States Court of Appeals for the District of Columbia Circuit, No. 79-166; and Unborn Child Roe v.

John J. Sirica, Judge, United States District Court for the District of Columbia, No. 79-188. Those courts have effectively ruled that they were bound by Roe v Wade regardless of any claim that it was wrongly decided. The federal judiciary is willing to enforce, permit, and omit to stop killings that violate the express terms of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree, without asking even a single question, much less demanding any answers.

The evidence shows that in the courts of the United States, the will of the judge has replaced the consent of the governed as the basis of law. By any definition, this is the overthrow of the United States Constitution.

If it be true, as Chief Justice John Marshall once held in Marbury v Madison, 1 Cranch 137, 163, 176, 178, that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of political institutions.

Furthermore, the Declaration of Independence is perverted by the judges to effectively read that "all Men are created equal, - except those created to die for the convenience of others."

CONCLUSION

If it be true, as Jefferson once wrote, that America is an "experiment" to establish that "man may be governed by reason and truth," and that "truth and reason will eternally prevail, however in times and places they may be overborne for a while by violence," then the facts showing the consent of the governed will ultimately prevail.

And Chief Justice John Marshall held, for federal judges to "swear" to discharge their duties "agreeably to the constitution," and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavors to preserve," is worse than "solemn mockery," it is a "crime." Marbury v Madison, supra, 179-180. The criminal law will not permit the "dagger of the assassin" to be "concealed beneath the robe of the jurist."

If the United States were being ruled over by a Tribunal of murderers holding office for life, and being blindly obeyed by all federal judges who violate the express words of the Constitution and positive criminal statutes, including mass murder in the first degree, without question, then surely it would be a fraud without parallel in the legal history of the world, and tantamount to the overthrow of the Constitution of the United States.

Alan Ernest
Counsel

Supreme Court, U. S.
FILED

FEB 9 1980

RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS, et al., Appellants

vs.

DAVID ZBARAZ, et al., Appellees

No. 79-5

ARTHUR F. QUERN, etc., et al., Appellants

vs.

DAVID ZBARAZ, et al., Appellees

No. 79-491

UNITED STATES OF AMERICA, Appellant

vs.

DAVID ZBARAZ, et al., Appellees

On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

On The Motion For Appointment Of
Alan Ernest As Counsel, etc.,

PETITION FOR REHEARING

Alan Ernest
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Counsel for Movant

PETITION FOR REHEARING

The petitioner herein respectfully moves the Court to vacate its denial of the MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE entered January 14, 1980, and to grant the motion for the following reasons:

1. The victims are not especially represented by counsel.
2. The movant has presented new evidence to the Court, not presented by any of the parties, to show that many of the killings that the Court asserted to legalize in its 1973 abortion decision, Roe v Wade, 410 US 113, are murder. This new evidence is manifestly unparalleled in the legal history of the United States.
3. This new evidence, supra, shows that under the District Court's order, the American people are being compelled to not merely permit, but to pay, for murder.
4. The movant also, by incorporation by reference, presented new evidence to the Court to show that Roe v Wade is based on false evidence.
5. This new evidence, supra para.4, shows that under the District Court's order, the American people are being compelled to not merely permit, but to pay, for the killing of people whose lives are protected by the Constitution and laws of the United States.

WHEREFORE, it can not be pretended that

it is any longer the government of the United States - any government of Constitution and laws - wherein judges presume to decree killings to be a constitutional right, and then refuse to allow counsel to represent the victims, refuse to allow the evidence that it used to condemn the victims to death to be cross-examined, and refuse to allow the victims to present the defense that they are being murdered.

Alan Ernest
Counsel for Movant

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

Alan Ernest
Counsel for Movant

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